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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 66

LOUIS DABNEY SMITH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 25, 1945.

CERTIORARI GRANTED MAY 28, 1945.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5329

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

LOUIS DABNEY SMITH

Defendant-Appellant

APPEAL

FROM A JUDGEMENT OF THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

APPENDIX

for Appellant's Brief

CURRAN E. COOLEY

GROVER C. POWELL

HAYDEN C. COVINGTON

Counsel for Appellant

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Judgment and Commitment

District Court of the United States
Eastern District, South Carolina
Columbia Division
No. 15,545

United States

v.

Louis Dabney Smith

Criminal Indictment in one count for violation of U. S. C., Title 50 Secs. 311, Appendix.

On this 9th day of November, 1944, came the United States Attorney, and the defendant Louis Dabney Smith appearing in proper person, and by counsel and,

The defendant having been convicted on Verdict of Guilty, No. 10th, 1944, of the offense charged in the indictment in the above-entitled cause, to wit:

Vio. Sec. 311, Appendix Title 50, U. S. C. A., (Selective Training and Service Act of 1940) one count, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three (3) Year and Six (6) Months.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Geo. Bell Timmerman
United States District Judge.

*Indictment***Indictment**

THE UNITED STATES OF AMERICA
EASTERN DISTRICT OF SOUTH CAROLINA
IN THE DISTRICT COURT
COLUMBIA DIVISION

UNITED STATES v. LOUIS DABNEY SMITH

At a stated term of the District Court of the United States for the Eastern District of South Carolina, begun and holden at Columbia, within and for the District aforesaid, on the first Tuesday of November, 1944, the grand jurors of the United States of America, within and for the District aforesaid, upon their oaths respectively, do present that Louis Dabney Smith, late of Richland County, South Carolina, hereinafter called the defendant, on the 30th day of September, 1943, in the County of Richland, State aforesaid, in the aforesaid Division and district and within the jurisdiction of this Court, unlawfully, knowingly and wilfully failed and neglected to perform the duty which he was required to carry out under the provisions of the Selective Training and Service Act of 1940, approved September 16, 1940, and the rules and regulations promulgated and prescribed thereunder; that is to say, the said defendant being a resident of the County of Richland, State aforesaid, and within the jurisdiction of the Selective Service Local Board No. 68, Richland County, South Carolina, having registered in accordance with the provisions of the Selective Training and Service Act of 1940 and having been subject to such provisions and the rules and regulations promulgated and prescribed thereunder and being under the jurisdiction and subject to the orders of the said Selective Service Local Board No. 68, Richland County, South Carolina, and having been ordered by the said Local Board to report for induc-

tion on the said 30th day of September, 1943, failed, neglected and refused to report for induction as ordered by the said Local Board; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

1st Count Sec. 311, Appendix Title 50 U. S. C. A.

Motion to Quash Indictment

Now comes the defendant and moves the court to quash the indictment and to order the prosecution dismissed because;

The indictment fails to state an offense against the laws of the United States.

The indictment is insufficient to state an offense.

The indictment fails to definitely and sufficiently advise the defendant of the nature of the offense charged. It does not appear therefrom what order and regulation under the Selective Training and Service Act the defendant is charged with violating. The indictment should state the order and regulation that the defendant is alleged to have violated.

The criminal sanctions clause of section 11 of the Act and the Regulations thereunder requiring the defendant to comply with the order made have been construed by the courts so as to require the defendant "who has been examined on a preinduction physical examination and declared acceptable and who has exhausted his administrative remedies by complying with and submitting to the selective process which was completed before the order to report for induction was issued, and who thereafter reports for induction but who refused to submit to induction at the Army Reception Center" as a condition precedent to testing the invalidity of the classification to submit to induction pursuant to the illegal order upon which the indictment is based, a vain and needless thing or act. The construction of the Act and Regulations penalizes the defendant for having failed

to submit to induction by denying him the right to show that the order is invalid because of defendant's exemption from duty under the Act as a minister of religion, thus making said Act and Regulations thereunder unconstitutional and void for each of the following reasons, to wit:

(a) They constitute a bill of attainder, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

(b) They transfer and surrender the judicial power of the United States Courts in the trial of a criminal case from said courts to the draft boards, so as to permit said boards to determine the guilt of the defendant, a judicial function, contrary to Article III of the Federal Constitution.

(c) They abridge the right of the defendant to have a judicial trial and deny him the right to prove his innocence, and also his right to be heard in his defense, contrary to the due process clause of the Fifth Amendment to the Federal Constitution.

(d) They deny and abridge the right of the defendant to a trial by jury and the privilege of having a jury pass on whether the defendant owes a duty because exempt and whether he is guilty of failure to perform a duty, contrary to the provisions of the Federal Constitution guaranteeing a trial by jury and to the Sixth Amendment forbidding the denial thereof.

(e) They permit conviction without evidence or upon hearsay evidence and deny the defendant the right of counsel in his defense contrary to the Fifth and Sixth Amendments to the Federal Constitution.

(f) They permit the draft boards to determine the guilt of the defendant, who is exempt and could not be found guilty of violating a duty under the Act, and thereby the Act and Regulations are converted into an ex post facto law, contrary to clause 3 in section 9 of Article I of the Federal Constitution.

WHEREFORE, the indictment being insufficient and the

law being unconstitutional and void as construed, it will not support a prosecution. Accordingly the indictment should be quashed and dismissed with an order discharging the defendant from all liability. Defendant prays for such other and further relief to which he may justly be entitled in the premises.

Transcript of Testimony and Proceedings

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF
SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES v. LOUIS DABNEY SMITH

OFFENSE:

**VIOLATION OF THE SELECTIVE TRAINING
AND SERVICE ACT OF 1940**

FAILURE TO REPORT FOR INDUCTION

SEPTEMBER 30, 1944

VIOLATION OF SECTION 311

APPENDIX TITLE 50 U.S.C.A.

For the United States: Messrs. C. N. Sapp, United States Attorney, Mr. H. H. Edens, Asst. United States Attorney, of Columbia, S. C., and Mr. Louis Shimel, Asst. United States Attorney, Charleston, S. C.

For the Defendant: Messrs. Curran E. Cooley, of Anderson, S. C., and Grover C. Powell, of Atlanta, Ga.

Reported by A. M. Deal, Columbia, S. C.

Mr. Powell: We have a motion to quash the indictment.
The Court: All right, read it.

The Court: The motion is overruled. Motion to quash.
Are you ready to proceed?

Mr. Smith, do you wish to plead guilty or not guilty?

Paul H. Leonard, direct

The Defendant (Louis D. Smith): Not guilty.

PAUL H. LEONARD,

a witness for the United States, was sworn and testified as follows:

DIRECT EXAMINATION

By Mr. Edens:

Q You are Mr. Paul Leonard of Columbia, S. C.?

A Yes.

Q What position do you occupy and what position did you occupy on September 30, 1943?

A Clerk of Local Draft Board No. 68, Columbia, S. C.

Q Do you know Louis D. Smith? Is he registered with your Board?

A Yes.

Q And do you have his address?

A Yes.

Q What is his address?

A 1706 Crestwood Drive, Columbia, S. C.

Q Prior to September 30, 1943, was he sent an Order to report for induction?

A Yes.

Q When was that Order sent to him and where was it sent?

A It was sent on September 18, 1943.

Q The Selective Service Regulations are administered by whom at Local Board 68?

A I am responsible for the administration of Selective Service law in Local Board 68.

The Court: Have you the record here to show how he was qualified?

A Yes, sir.

Questions by Mr. Edens:

What was the classification?

Witness: The classification is 1-A.

Q And as a result of such classification pursuant to instructions from your Board what did you do?

A He was ordered to report for induction on the 30th day of September, 1943.

Q How do you know that he did not report?

A Because I went out to the truck in Columbia. Government transportation was furnished by the Local Board to the Fort. And I had his name together with two other names to determine whether he did report, and he did not answer, and the truck left the office, and he wasn't at the office and didn't report as ordered.

Q And the Order read for him to report at 8:30 on the morning of the 30th, is that correct?

A Yes, sir; at the office of the Local Board to the Local Board on the 30th of September, 1943.

CROSS EXAMINATION

Questions by Mr. Powell:

Q Did you receive a phone call from the induction station?

Mr. Shimel: We object to that.

Questions by Mr. Powell:

Q From the officer charged with inducting registrants?

The Court: He can answer yes or no.

Witness: After the other registrants had left in a truck and reported as ordered I did receive a call from the induction station. From whom, I do not recall.

C. M. McCracken, direct
Paul H. Leonard, recalled, cross

C. M. McCracken,

a witness for United States, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Edens:

Q You arrested Louis D. Smith subsequent to September 30, 1943?

A Yes.

Q Did he at the time you arrested him advise you whether or not he had received his Order to Report for Induction?

A Yes, he did.

Q Did he state to you that he had received his Order to Report for Induction on September 30, 1943?

A Yes, he said he received the Notice to Report for Induction.

. . .

PAUL H. LEONARD,

a witness for United States, recalled, testified as follows:

CROSS EXAMINATION

Questions by Mr. Powell:

Mr. Powell: At the present we merely want the introduction of this evidence.

Mr. Shimel: We object to it.

The Court: The Supreme Court has decided that I cannot review what the Draft Board did. And that is precluded as far as this Court is concerned.

Mr. Powell: We except to the Court's ruling and ask that it be marked for identification.

The Court: Marked for identification, and excluded.

(Questionnaire marked for identification Defendant's Exhibit A.)

. . .

○ LOUIS D. SMITH,
the defendant, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Powell:

Q Is this Louis Dabney Smith?

A Yes, sir.

Q What is your occupation, Mr. Smith?

A I am a minister of Jehovah God. I am a minister of the Watchtower Bible and Tract Society.

Q How old are you?

A Twenty one years old.

Q How long have you been a minister?

Mr. Schimmel: We object to that on the ground that it is immaterial.

The Court: Excluded.

Mr. Powell: We except to the ruling and state that if the defendant were permitted to answer he would state that he has been a minister for a number of years before his registration.

The Court: To be perfectly frank about it, what you are trying to do is attack the rulings of the Draft Board?

Mr. Powell: May it please the Court, I believe honestly under the Court's ruling relative to our Motion to Quash we have a legal right—

The Court: That is your purpose?

Mr. Powell: Under our Motion to Quash.

The Court: That is your intention now?

Mr. Powell: Yes.

The Court: I hold that you cannot do it. And that is the decision of the Supreme Court in more than one case.

Questions by Mr. Powell:

Q Mr. Smith, how long have you been a student of the Bible?

Mr. Schimmel: We object to that.

The Court: That is excluded.

Mr. Powell: We except, and as a part of our exception we would state that if he were permitted to answer he would state that he has studied it from childhood.

Q Were you taught the Scriptures by your mother and by your grandparents?

A Yes, sir.

Mr. Schimmel: Your Honor, I do not think the rule requires him to keep on asking questions.

The Court: No. I think your questions are all about the same point, the same issue. I have already made several rulings on it, and I do not see that I am required to occupy an hour of the Court's time in ruling the same thing over and over.

Mr. Powell: We call your Honor's attention to the fact that the document introduced by the Prosecution has matter in it relative to his ministerial status, how long he studied, and we have a right now as a part of our defense to cover the same ground.

The Court: No, the only issue involved here is whether this man was classified, and having been classified he was ordered to report for induction, and having been ordered to report for induction, he failed to report for induction. This Court and this jury have nothing to do with whether he was properly classified or not.

Mr. Powell: May it please the Court, may I ask a broad question and then make a statement—a general statement that we would like to make as a ground for our exceptions so as to preserve our rights?

The Court: You want to attack the Local Board. And I am ruling that you cannot do it. That is plain enough, isn't it?

Mr. Powell: We would like to get our exceptions as to that.

The Court: You cannot offer testimony to attack the action of the Local Board. Now, you can have an exception

to that, if you want it.

Mr. Powell: May it please the Court, we take this position, that this defendant has complied with all of the ministerial regulations completely under the Billings case and now that he has the right in this case to attack the rulings of the Board as the Supreme Court of the United States said that he did have the right to attack in the Falbo case.

I will lay the predicate for that.

Q Mr. Smith, were you—did you report to the Fort—Fort Jackson?

Mr. Schimmel: We object to that. It is what the Local Board ordered, and that is all.

The Court: That is the sole question here.

Mr. Powell: We would like to except, and as a part of our exception is that he did report, we would like to ask further—

Q Mr. Smith, were you physically prevented by others over whom you had no control from reporting to the Draft Board on the morning in question?

A Yes, sir, I was.

Q State whether or not—just tell the Court what happened on that occasion.

A The date was September 30th, I believe, around September, 1943, and I was at my home in Columbia in the bath room shaving. While shaving I heard a commotion down stairs and opened the door to find out what was the trouble, and I noticed that there were three men coming up the steps.

Q Who did you learn that those three men were?

A I learned that one was a Magistrate, and with two Deputies.

Q And where were you told that they were from? Did you understand that they were from the Draft Board? What did they say?

A I understand that they were from the Draft Board.

Q Well, what did these three men say to you?

A They said that the Government had sent for me to take me out to Fort Jackson.

Q Did you ask for any authority for their coming for you?

A Yes; I asked if they had a warrant; and they said that they didn't need a warrant.

Q Did any of them have arms? Was there any show of arms?

A Yes, sir, there was.

Q Who was that?

A I believe it was the Magistrate himself. He displayed a pistol on the side.

Q Was that done to intimidate you?

A Yes, sir. He stepped and opened his coat up like that; and I saw that there was a pistol on his side.

Q And what did he say after that?

A He said, "Come on. Let's go. I will take you out to Fort Jackson."

Q And you went under his commands under those circumstances?

A Yes, sir, I did.

Q Did they put you in a car?

A Yes, sir.

Q Where did they carry you to?

A They first took me to the Provost Marshal's office at Fort Jackson.

Q Then what was done?

A I was then taken to the induction station at Fort Jackson.

Q Well, what was done with you there?

A I was turned over to a Sergeant at the desk of the Induction Station, and I was told—

Q By whom were you turned over to the Sergeant?

A By the Magistrate and two Deputies.

Q These three men that you have mentioned?

A Yes, sir.

Q Who took charge of you at that time?

A The Sergeant there at the desk.

Q What time of day was that?

A That was, I believe, between 8:30 and 9:00 o'clock.

The Court: You don't know what time it was?

Questions by Mr. Powell:

Q What date was that?

A I believe that was Thursday, September 30th or around about that time.

Q Was it before 9:00 o'clock?

A Yes, sir, it was.

Q What was done then, what did the officer do that took you in charge? It was an Army officer, was it not?

A Yes, sir, it was a Sergeant.

Q Sergeant who?

A I don't know his name.

Q Well, what did he do?

A I told him that I was a minister of the Gospel.

The Witness: I was a minister of the gospel, and because I knew that the Board was prejudiced against me, and they refused to give me a ministerial classification to excuse me, and that I was not to be inducted into the Army.

Q Did the Sergeant take your word for it?

A He took up the phone and called Local Board No. 68 and spoke to Mr. Leonard.

Q Could you hear him call?

A Yes, sir.

Q What did you hear him say?

A He asked if I was supposed to be inducted into the Army that day.

Q Now, Mr. Smith, what did he proceed to do with you after you heard that conversation?

A They proceeded to take me to a building to await the arrival of other members of Board 68.

Q What did he tell you, about Mr. Leonard, what did

Mr. Leonard have to say?

A He told me that Mr. Leonard said I was supposed to be inducted into the Army that day.

Q And did he say that he should send you back over to the Board to be transported back to Fort Jackson?

A No, sir.

Q State what he said.

A He said that Mr. Leonard said I was to report for induction that day, September 30th.

Q And did he state whether or not he should retain you there until the others arrived?

A He said I must await the arrival there of the others from the Local Board.

Q The others hadn't arrived?

A No, sir, they had not.

Q Was that a part of the conversation he related to you?

A Yes, sir. I was taken to the building to await the arrival of others from Local Board 68.

Q What happened when you were taken to this other building?

A The roll was called and my name was called, and all were to answer if they were present.

Q Did you answer present?

A Yes, sir, I did.

Q Was that by the same officer?

A No, sir, it wasn't.

Q Who called the roll?

A I do not recall the individual who did, but some one in charge.

Q He called the roll for the group of men that were there at the Induction Station?

A He was placed in charge of the selectees from the Local Board.

Q Now, then what took place then, Mr. Smith?

A We went through the physical examination.

Q You went through the physical examination?

A Yes, sir, I did.

Q Did the others go through the same physical examination that you did?

A Yes, sir, they did.

Q Then what took place?

A I was then told to wait at the side of the induction building there until my name was called, called again.

Q Was your name called?

A Yes, sir, it was.

Q Did you wait?

A Yes, sir, I did.

Q In obedience to that command?

A Yes, sir.

Q And then what took place?

A I was called over to the Army and Navy Building and asked my preference for the Army or Navy.

Q And what was your reply?

A I replied that I chose neither, that I was a minister of the Gospel and I was exempted from military service.

Q Did you make any statement about your being there?

A Yes, sir. I explained that I was brought out there against my will, and I explained that I was a minister and could not be inducted into the Army.

Q Well, what was done then?

A I was then called into another building where I was finger printed and questioned.

Q What questions were you asked?

A They were questions relating to my home and name and family.

Q And occupation?

A And occupation.

Q And what answer did you make to the questions?

A Well, I stated that I was a minister of the Gospel, and again that the Board was prejudiced against Jehovah's Witnesses and as a result they refused to classify me as a

minister, and I wanted to be released.

Q Then what was done, Mr. Smith?

A I was then called with the group of other—the same group over to another building for the oath of enlistment to be read.

Q Was the oath read?

A Yes, sir, it was read.

Q Were you there with the group to whom it was read?

A I was aside from the group.

Q Just state how it took place.

A Well, the officer there or Sergeant in charge explained that any one who—if there was any one present who desired not to take the oath to stand aside and raise their hand, and I did.

Q You did what?

A I raised my hand. And he said, "Step aside from the group."

Q What did you do?

A I stepped aside.

Q Were you the only one that stepped aside?

A No, sir. There was another person that did too.

Q Go ahead and tell what was said.

A The oath of enlistment was read to the group. I heard the oath. And I was given transportation back to the City of Columbia. I was given an order—

Q Just state—you said the oath of enlistment was read. Was anything else said?

A Yes, sir. I was given an order—

Q Was anything said about your stepping aside, anything said to those who stepped aside, you and any others?

A Yes. We were told that regardless of whether we took the oath of enlistment or not we would still be in the Army.

Q Did you take the oath?

A No, sir, I did not.

Q And he told you that you were still in the Army?

A Yes, sir, regardless of whether we took the oath or not.

Q Then what took place?

A We were then told—given an order to report back to the Reception Center.

Q Just a minute. Were you given any order before you were told that, given any pass?

A Yes. The Articles of War were read, quoted, in regard to absence without leave and desertion.

Q That was read to you only or the entire group?

A The entire group. And that if we failed to report we would be court martialled.

Q Were you then granted a leave?

A For twenty one days.

Q And you accepted that leave?

A Yes, sir, I did.

Q Where did you go on that leave, Mr. Smith?

A I went back home, to my home in Columbia.

Q When did you report back?

A At the end of twenty one days, at the time required.

Q How did you go out there, out to the Fort on this occasion?

A I was taken out there by an Army truck.

Q Had arrangements been made for this truck to pick you up on a certain day?

A Yes, sir.

Q And you were there to meet the truck?

A Yes, sir.

Q And went back to the Fort in that truck?

A Yes, sir.

Q Were you alone?

A No, sir.

Q How many were with you?

A Our names were called and there were approximately twelve others with me.

Q Were they the same that were present when the oath

was read?

A Yes, sir.

Q Did the driver transport you back to the Fort?

A Yes, sir.

Q What took place then?

A I was then taken to a building and further—there was further induction or further procedure.

Q Just tell what took place.

A I was taken to this building and waited for a period of time.

Q Were you in company of others?

A Yes, sir, I was. And during that time I requested to speak to the Lt. Col. in charge of the Reception Center to explain to him again that I was a minister of the gospel and, according to the Draft Law ministers of the Gospel were exempted from military service, and I knew that members of the Local Board were prejudiced against witnesses of Jehovah.

Q Did you submit any evidence?

A Yes, sir, I submitted sufficient evidence to prove that I was a minister.

Q Will you proceed and tell what took place?

A I went back through the procedure. I do not exactly recall all of it, but I remember the particular part where they were to issue the clothes for the Army, and I explained to the one in charge that I had previously spoken to the Colonel and said that I would refuse to put on the uniform, that I was a minister of the gospel and exempt from military service, and they said, "Oh, we will put it on you anyway." And after everybody had gone through the form of putting on military clothes there were five or six that tore my clothes off me and put the military clothes on me.

And I was taken to the military barracks, and I took off the clothes, and I spent that night in the barracks with no clothes and between two mattresses.

After that the next morning I was given an order to put on those clothes and told the penalty if I refused, and I again stated that I was a minister of the gospel and ministers were exempted from military service.

Later in the day my civilian clothes were brought back to me. And I stayed at this Reception Center for three weeks and three days, questioned by men and endeavoring to force me to put on the clothes against my will.

And I explained that I had a greater obligation to Almighty God and had to obey his law.

And I was taken to the Fort Stockade. And they proceeded to force the uniform on me again. I was thrown to the ground and the clothes taken off me and the uniform put on. And I was taken to what was known as the black box, with the door shut.

Q How long did you remain there?

A I remained there four days with no clothes and no food. Just water. At the end of four days the Articles of War were read to me concerning refusing to obey orders. And they told me that I would be court-martialed and may be get twenty or thirty years. And I again explained that I was a minister of the Gospel and had made a covenant with him to carry out his almighty will.

Q How did you get out of the Army, Mr. Smith?

A When it was seen that I was to be given a military court-martial a writ of habeas corpus was taken out to seek my release.

Q Were you released on the writ?

A Not in the lower court.

Q Were you court-martialed?

A Yes, sir. I was given a court-martial and sentenced to twenty five years.

Q And after that were you released on a habeas corpus as a result of your appeal to the Circuit Court of Appeals?

A Yes, sir.

Q How long did you stay at Fort Jackson all told?

A I stayed approximately six months.

CROSS EXAMINATION

Questions by Mr. Edens:

Q Where did you plan to go on the morning of September 30th?

A I planned to go to the U. S. Commissioner's office.

Q You had received your Order to Report for Induction on September 30th at 8:30, that is correct, isn't it, Mr. Smith?

A I received an Order. I don't know whether it came from the Local Board.

Questions by the Court:

Q Did you intend to obey it?

A Do I have to answer that?

Q Yes.

A No, sir, I did not.

Q You would not have reported anyway, is that what you said?

A I wasn't supposed to report.

Q I asked you would you have reported.

A No, sir, I would not.

The Court: What a man has in mind does not concern his intent as to whether it is wilful or not?

Questions by Mr. Edens:

Q At what stage did you propose to refuse to be inducted into the United States Army?

A I refused to take the oath.

Q Your Order said for you to report to your Local Board at 8:30?

A I understand it did, and they called at 9:00 o'clock.

Q Well, what time do you say now it was that they came by?

A I am not definite on the exact time, but I knew it was around 8:15 or 8:30, between 8:00 and 8:30. I could not tell you the exact time.

Q And didn't you tell the F.B.I. agent when he interviewed you that it was after 8:30 when those men came by?

A I don't remember whether it was or not.

LOUIS SMITH,

a witness for defendant, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Powell:

Q Mr. Smith, were you at home on the morning of September 30, 1943, when three men came to your house?

A Yes.

Q Who were those men?

A It was Ollie Mefford, the Magistrate at Five Points, and those two deputies, but I do not know their names.

Q Don't know their names. What time did they come?

A 8:00 o'clock, I made a date with them for 8:00 o'clock.

Q Is that why you so definitely remember the time?

A Yes, sir.

Q Did you call for them to come out there, Mr. Smith?

A I did.

Q Just what did you do to arrange for them to come out?

A I knew that the boy wasn't going to report, and I wanted him to report, and I had been to several of the Draft Board officers; in fact, I went to Mr. Leonard.

The Court: It might lend something to the jurors' understanding if they knew what relation you are to the defendant.

The Witness: Well, I am his father. I went to Mr. Leonard. I knew that the boy wasn't going to report, and I wanted him to report, and I thought he ought to be in the Army. And I asked Mr. Leonard if there was any way we could arrange with the law or Draft Board to have that boy taken out to Camp Jackson. And Mr. Leonard said, "That boy could come out here and walk up and we could not touch him. We have no police power to take him out there. The only way you can get him out there is to take him in your car."

Questions by Mr. Powell;

Q Did he tell you that you could take him?

A He told me that I could take him. And in addition to that I went to see Col. Brice and I asked him if there was any way for me to get that boy out there, and he said, yes, so he got out there, but the Draft Board had no Police power whatsoever, because they could not make him go. I could, but they could not.

Q Just tell what happened.

A I was told that if the boy got out there it was all right, he would not have to report at the Draft Board, at that building where No. 68 is, and that I could make any arrangement I so pleased with any police power to get him out there, that they didn't have the authority to do it, the Selective and Training Law didn't have any police power. And not only he told me that, but Col. Brice told me that.

Q Who was he?

A He was an assistant to Gen. Springs at the Selective Service Headquarters. And Col. Brice told me that he didn't have any police power and that I would have to get him out there the best way I could.

I then went to Mr. Robert Wise, R. K. Wise, who is the agent for Draft Board 68, and who helped me a great deal in this situation, and Mr. Wise first told me that if I got

three men, or some men, not three necessarily, if I got those men to take that boy out there it would constitute induction into the United States Army.

And I did not know that he would not accept the actual going into the Army until he acted the way he did after he got out there.

Q Did they say that that would be acceptable to them?

A Yes; that is the impression that I got about the whole thing. He said he could walk about the Draft Board all he pleased and they would not lay a hand on him. And I said, "How do you get them out there?" And he said, "The Army truck comes in for them."

Q Then what did you do, Mr. Smith, what did you do after that?

A I went down to see Ollie Mefford, and Ollie Mefford agreed—in other words, I promised I would pay him something if he would do that, I offered him \$25., and he said that was all right, and to make it better I gave him \$30. And he said—he and the three men came out to my house at 8:00 o'clock on the morning of September 30th and took that boy to Camp Jackson.

Q And you were there when it happened?

A Yes, sir.

Q And you told the boy to go along with them?

A I told the boy to go along.

CROSS EXAMINATION

Questions by Mr. Schimmel:

Q And he told you that he wasn't going?

A Yes.

Q And it was because he told you that he wasn't going that you did all you could to get him to go?

A That is right.

Q And he has consistently taken that position that he would not be inducted into the armed forces?

A Yes, sir; but I did all I could to make him do it.

MRS. LOUIS SMITH,

a witness for defendant, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by Mr. Powell:

Q Do you know what time it was?

A It was 8:00 o'clock.

Q Will you tell what took place on that occasion?

A Well, I saw three men coming in the house, and I ran up the steps and by the time I got to the top of the steps they were behind me.

Q Did they say anything to you?

A No, I did not see them come in the door. And my son was in the bath room with the door locked, and he heard this noise and opened up.

Q Did he come down stairs?

A No, not then. He closed the door. And those men told him to come on out, the Government had sent for him. I said, "You go down those steps. He will come." And they stepped outside, went in the hall.

And he came down the steps and he asked those three men for the warrant, and they said that they had it in the car, and he said, "I would like to see it." And they said, "It is down"—they made some remark, and I said, "Let me see the warrant." And they said, "No, it is down in the Draft Board." And I said, "Son, don't give them any trouble."

Q Did you see any side arms at that time?

A I guess I did. I would not swear to that. I know it was there. I have heard it so much.

Q And what did they do, put him in the car and take him with them?

A One went in front of him and one behind him and they put him in the car and went off and I did not see him any more until 6:00 o'clock the next day.

Q And then did he come home?

A He came home and stayed for twenty one days and I took him down to the Draft Board and I did not see him any more until several days later.

Mr. Schimmel: We have no questions.

Motion for Directed Verdict

Mr. Cooley: If the Court please, the defendant moves for a direction of a verdict of not guilty on the ground that the evidence is not sufficient, there is no sufficient evidence upon which to convict.

And upon the further ground that as construed by the Court the law under which the defendant is charged is unconstitutional, in that it is a bill of attainder and a bill of pains and penalties and in that it denies the defendant due process of law.

Now, the way in which the facts have been presented here make it necessary that in our argument of the motion I cannot be quite as logical as I could if we had been permitted to bring out our full testimony, upon which we base our motion.

As to the insufficiency of the evidence, beginning with the Order to Report, there is no proof that a lawful order to report has been made by competent authority. Now, let's see what the proof is as to the Order to Report.

It was testified—I will put it this way, there was introduced in evidence a part of a file, Draft Board file of the defendant, showing the carbon copy of what was purported to be an Order to Report on Form 150, I presume that is.

Now, let's see what the Regulations—

The Court: That is Exhibit No. 2, Plaintiff's Exhibit No. 2!

Mr. Cooley: Yes, sir. Now, the Regulations as they stood at the time this happened, reads as follows: Section 633.1, dated 1-15-3, which was in effect until October 4th of that year, so that covers the period of time involved here. (Reads.)

They didn't file the copy of the sheet. There is no proof of what they mailed to the registrant. Mr. Leonard testified that that was a copy, carbon copy, but you notice it is not signed. Therefore, it is not an Order to Report. Three or four inclosures could be written out and filed in the office, but it would not be an Order until it was signed. Mr. Leonard said he did not know who signed it. He said it was the rule that a member of the Board would sign it or the Clerk. His testimony is from presumption. He has not proved in this particular instance that it was signed or by who.

Now, we get to the facts of the case. Our contention is that the man did report within the meaning of the Selective Training and Service Act and the Regulations. The object of the whole Selective Service process is to deliver a man to the Induction Center for induction into the Army, into the armed forces. The Supreme Court in the Billings case has said that a man has the right to exercise his choice at the Induction Station as to whether or not he will be inducted. In other words, there can be no forcible induction. His physical presence is necessary at the Induction Station in order to enable him to exercise that choice.

The Order, so-called, of the Local Board: (Reads from Order, beginning, "You will therefore report" and ending, "and Naval forces.")

Now, there could be no doubt about the man's physical presence at Fort Jackson. He reached there twenty minutes before the other selectees in the same group. At the time that this Order was issued a like Order was issued to other

men.

The Court: Do you take the position that a report not to be inducted is equivalent to a report to be inducted?

Mr. Cooley: Yes, sir, I take the position that under the Billings case he complies with the Order to Report when he goes to the Induction Center. It is then his choice to say whether he will be inducted or be prosecuted.

Mr. Cooley: Our position here as near as I can express it is that he reports, that he complies with the Law and Order and Regulations when he is physically present at the Induction Station at the time that the induction is being present at the induction process. Whether or not he goes through with it willingly is a matter for him, but he complies with the Order to Report when he is there.

The Court: In the Billings case they use this language: (Reads, beginning, "Under that view"—)

As far as I can make it he was ordered to report for induction. If he reports not to be inducted he has not complied with the law.

Mr. Cooley: If I understand you correctly, if you think, if your idea is that he must have an intention to go through with the process when he reports in order to comply with the Order to Report, I disagree with you.

The Court: You think all this man has to do is to report and walk off and he has violated no law?

Mr. Cooley: I think they should have prosecuted him for failure to submit to induction and not for failure to report. I do not think that they can prosecute him for but one. He could not refuse to submit to induction unless he was there at the time it was offered to him; and if he was there they could not prosecute him for not reporting.

The Court: It is not necessary for me to make a ruling of that sort. I hold that this Court has no jurisdiction in the trial of this case to review the action of any administrative

agency in reference to its classification and that he must accept classification and the Orders of the Draft Board to Report for induction.

Whether or not he has exhausted his administrative remedies he cannot secure a review of administrative action in a case of this character.

I am of the further opinion that there is sufficient testimony to go to the jury.

I do not think that the Act is unconstitutional.

However, I think there is proof of the classification and that there is also proof of the Notice to the defendant to report for induction.

Judge's Charge to Jury

Mr. Foreman and gentlemen of the jury, I desire to state to you at the outset of my charge just what the defendant is indicted for, because it is the indictment that frames the issue for your decision.

It is charged in this indictment that the defendant unlawfully, knowingly and wilfully failed and neglected to perform the duty which he was required to carry out under the provisions of the ~~Selective~~ Selective Training and Service Act of 1940, in that he being a resident of the County of Richland, State of South Carolina and within the jurisdiction of the Selective Service Local Board No. 68 of such County and State, having registered in accordance with the provisions of the Selective Training and Service Act and having been subject to such provisions and the Rules and Regulations promulgated and prescribed thereunder and being under the jurisdiction and subject to the orders of said Selective Service Local Board No. 68 and having been ordered by said Board to report for induction on the 30th day of September, 1943, failed, neglected and refused to report for induction as ordered by said Board. That is what the Government charges the defendant with having done in violation of law.

In 1940 the Congress of the United States, exercising its legislative functions, passed an Act, which shortly thereafter went into effect, commonly called the Selective Training and Service Act of 1940. It will not serve a useful purpose for me to read the entire text of this Act, but it is appropriate that I draw your attention to certain provisions of that Act, which I will now proceed to do.

It is said in this Act, and I am quoting, Sec. 2, Registration in general, "Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder."

And additionally the Act prescribes as follows, and I am quoting again: Sec. 3 Training and Service in general. (a) "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States."

Skipping over a part of that section, I take up again, quote: "The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment is required for such forces in the national interest." That ends that quote.

It is otherwise provided by Act of Congress, gentlemen of the jury, that rules and regulations for carrying into effect this particular Act may be promulgated and that

they shall have the force and effect of law and, as you will see later by certain regulations that I shall read to you, the form prescribed by competent authority under this Act shall become and have the effect of a rule or regulation as used, in the sense as used in the Act.

I quote further from the Act: Sec. 11. Penalties. "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the Rules or Regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty," skipping over a part and taking up and quoting that again, "or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act . . . shall, upon conviction in the district court of the United States having jurisdiction thereof," that ends the quote, be punished by fine or imprisonment or both.

In order to carry the Act into effect there have been promulgated from time to time certain rules or regulations which have the force and effect of law, as you have heard from the reading of portions of the Act, but it will serve no useful purpose to read in your presence all of those rules and regulations, because a great many of them have no application to the controversy now before you for settlement.

I do desire to read to you one of the rules or regulations denominated Section 605.51. It reads as follows: "All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective

Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether hertofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement."

I also call to your attention and read to you regulation bearing No. 633.1: "Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in duplicate. The local board shall mail the original to the registrant and shall file the copy in his Cover Sheet (Form 53)."

Now, Mr. Foreman and Gentlemen of the Jury, as stated to you, the Government charges that this defendant, being a resident and having been classified, was ordered to report for induction on September 30, 1943, that he wilfully and knowingly failed to perform his duty in that respect by reporting for induction.

Now, Gentlemen of the Jury, a person may be said to have knowingly and willfully done something or to have failed to have done something when he is conscious of and knows of the duty to do that which is required of him or of his duty not to do that with which he is charged.

Willfullness in law is said to be a conscious doing of something that the party guilty of the act knows should not be done or the conscious failure to do something which one knows he should do.

In this case the defendant is charged with knowing that he was required by his local board having jurisdiction over him to report at a certain time for induction into the Army and that, with knowledge of that requirement and with no intention to perform it, he stayed away and did not do that

which was required of him. Now, that is the gist of it, the charge against him.

Now, something has been said in this case about the defendant being restrained. I charge you that a person who is required to do something, if he is prevented from doing that through no fault of his own, if some outside force which he cannot control intervenes to prevent him from performing his duty, that would be a good defense so long as the restraint exists, but it would not relieve of the duty and responsibility of performing said duty when the restraint was removed.

Now, it is a question of fact for you in view of all of the testimony in this case, the testimony of the defendant and the testimony of the other witnesses, as to whether or not any physical restraint had anything to do with his not reporting for induction.

In other words, if it is my duty to go down in front of this Court House at a given hour, and before and at the time it is my duty to go I have no intention of doing so and would not do so, the mere fact that somebody may have laid hands on me and held me temporarily might have nothing in the world to do with my absence in front of the Court House where I was supposed to go, but if it did, if I decided that I would not go, and then changed my mind and decided I would go, then my duty called me there as soon as that restraint was removed.

Now, something, Gentlemen of the Jury, has been said in argument about the fact that a selectee or inductee might be rejected after he reported for induction. And so he might. But that does not operate to relieve the selectee or inductee from the duty of reporting for induction. If it did, the law would mean that only those who wanted to go would go and those who did not want to go would not go.

I charge you that regardless of whether he would or would not have been rejected as unfit for the service, it was the duty of the defendant under the Order to report,

which he admits that he received to report.

I charge you further, Gentlemen of the Jury, that the law has set up a method to determine who is and who is not subject to this Act and subject to conform. You and I in a case of this character must accept that determination as final. We have no authority, neither you nor I, to go behind it. There are other methods provided to protect, methods declared by law to be adequate to protect, the inductee or selectee in his rights.

So if you find from the record in this case that this defendant had been classified by his Local Board, and pursuant to that classification he had been called to report for service, I charge you that it was his duty to report for induction.

Neither you or I have a right to question the judgment and conclusions reached by the Draft Board or any Appeal Board that had jurisdiction in this case. That has already been settled once.

Now, Mr. Foreman and Gentlemen of the Jury, when a defendant is brought into this Court charged with a criminal offense, he comes into the Court with a presumption of innocence, and the Government which affirms his guilt has the burden of proving his guilt, not by mere preponderance of the evidence but beyond a reasonable doubt, sometimes interpreted to mean to a moral certainty.

A moral certainty is not an actual certainty. If that were the law, no person would ever be able to sit on a jury and convict one charged with crime who was not a witness to the crime, and every defendant who could avoid having witnesses on the jury when he committed his crime would always escape.

I am sure that you gentlemen have from time to time heard the expression, "I am sure of that to a moral certainty." It may be that the person speaking didn't see the thing that he is sure of or he didn't hear it or he didn't feel it, but he was morally certain it was true because of

evidence that had come to him which he believed creditable. Believing it, then he would say he was sure of it to a moral certainty.

You go home and meet your wife at the front door and she would say to you, "The boy or the daughter is in bed sick." You haven't seen them, but if you believed your wife you would be morally certain of it. That is what I mean, that character of testimony that you hear or that character of evidence that you see in the record which brings home to you a conviction of the truth of some matter in controversy.

Now, a reasonable doubt. People have tried to define it. I have often thought that when you come to define a reasonable doubt you may create more confusion than clarity. You as reasonable men know what it means. You do things for reasons or you refrain from doing something for a reason or reasons. Now, you can say that you have a reasonable doubt of somebody's guilt when you have that character of doubt for which you can give a reason. It is not a flimsy doubt or a fanciful doubt.

Some addle brain might say that he doubted that the sun would ever shine again or that we would ever see in this country the water falling from the skies in rain or that he doubted that the moon or the stars would ever appear again in the Heavens. That is a flimsy fanciful doubt. It is not that kind of doubt that we deal with, but the doubts we deal with are substantial, doubts that grow out of the testimony or evidence or the lack of it, either one or the other.

Mr. Foreman and Gentlemen of the Jury, a number of Requests to Charge have been submitted, the first four of which deal with the subject of reasonable doubt. I think I have sufficiently covered that, except to say to you that if you do entertain a reasonable doubt of this defendant's guilt, it would be your duty to find him not guilty or, to state it the other way around, if you are not convinced of

his guilt beyond a reasonable doubt you would not be warranted in convicting him.

Defendant's Requested Instructions

The Defendant's Sixth Request:

"Defendant is charged with having violated the Selective Training and Service Act of 1940 in that he is said to have 'knowingly, wilfully and unlawfully' failed to submit to induction."

[By the Court:]

He is charged, Gentlemen of the Jury, not with failure to submit to induction in terms but with failing to report for induction. I make that qualification of that Request.

Now, continuing with the Request:

"The word 'knowingly,' as used in criminal statutes, means that at the time of the committing of the offense the defendant must have known what he was doing, and with such knowledge proceeded to commit the offense charged. As used in the Selective Training and Service Act of 1940 it is distinguished from innocently, ignorantly or unintentionally,"—

I stop on that comma.

(The balance of the sentence, which was not read, is as follows: "And does not merely mean voluntarily or unintentionally")

I think I have already charged you that, gentlemen. He is in effect charged with the conscious failure to perform a duty.

Taking up the quotation again:

"It means prompted by bad faith or with an evil intent or for a bad purpose."

I charge you, Gentlemen of the Jury, it makes no difference what his purpose was, if he deliberately and intentionally neglected to perform a duty required of him under the law, knowing that it had been required, for that would meet the requirement of the law.

Picking up the Request to Charge again:

"The word 'unlawful' means that which is done in an unlawful manner in violation of laws, rights and duties. It almost means without legal justification."

I may add right there, Mr. Stenographer and Gentlemen of the Jury, that it does not almost mean a legal justification, it does mean that, because if there is legal justification there is no violation of law.

Reading further:

"If the defendant had legal justification for his acts they could not be unlawfully done."

Why, of course not. "In other words the term 'unlawful' implies that the act was not done as the law recognized. The burden is upon the Prosecution to prove that the defendant failed to perform a duty required of him under the Act."

That is right. As modified I charge you that Request.

("Defendant's Requested Instruction No. 9

All persons between the ages of 18 and 45 are subject to the Selective Training and Service Act of 1940 and are liable for training and service thereunder at such time and in such manner as the Selective Service System may prescribe for him unless he is exempt from all training and service by the Act itself. The only persons exempted by Congress from training and service are "regular or duly ordained ministers of religion and students preparing for the ministry." (Sec. 5 (d)) If a registrant is a "regular or duly ordained minister of religion" within the meaning of the Act and Regulations at the time of his registration and classification, he has no duty to submit to training or render services under the Act and the local draft board has no authority to order him to do training and service under the Act. Unless you can find beyond a reasonable doubt that he had a duty and that he was not a minister of religion you cannot convict.")

("Defendant's Requested Instruction No. 10

If the jury find that the defendant, in pursuance of the order of the local board, was present at the induction station at the time fixed by the board and while there underwent the examination and other procedure with the other selectees and obeyed the orders of the military authorities while there, and participated in the induction ceremony, even though he may have refused to be inducted, I charge you that in contemplation of law he reported for induction and cannot be convicted for a failure to report for induction.")

. . .

("Defendant's Requested Instruction No. 27

If you find from the evidence or have a reasonable doubt thereof that the defendant submitted to the local board before classification proof that he is and was a "regular minister" of Jehovah's witnesses and that the draft boards had no substantial evidence or proof disputing such claim and arbitrarily and capriciously failed to consider the proof given them by defendant that he was a "regular minister" of Jehovah's witnesses, then you will acquit the defendant and by your verdict say 'not guilty.'")

. . .

And I charge so much of the Defendant's Request No. 40 as I now read to you, which is the first half of it:

"You are instructed that although you may not be permitted to inquire into or judge the validity or the invalidity of the classification by the draft boards given to the defendant nor can you say whether or not the draft boards were wrong in classifying him, you must and will, however, consider all of the defendant's testimony given as his reasons for not reporting for induction in determining whether or not he knowingly and unlawfully failed to report for induction."

So much as I have read I charge you, Gentlemen of the Jury, that it is a good instruction. The remainder of the

request is refused, and around the remainder I have marked so as to indicate the part that I have refused. Only the part I read is charged.

(The portion of Request No. 40, refused by the Court and not read, is as follows:

"If you find and believe from the evidence, or have a reasonable doubt thereof, that the defendant, at the time he failed to report for induction, honestly and in good faith believed that he was exempt as a minister of religion under the Act and Regulations from training and duty under the Act on the basis of his actual occupation and activity as a minister and thereby honestly believed that the Act was not applicable to him and that the order did not have to be complied with by him, you will acquit the defendant and by your verdict say, 'not guilty.'")

Now, Mr. Foreman and Gentlemen of the Jury, you go to your jury room and you will have with you this Indictment and you will carry with you the exhibits so that you may refresh yourselves as to the contents of those exhibits.

I wish to say to you that it is your duty to consider and compare all of the testimony in this case. It is your prerogative to believe or disbelieve the testimony of any witness. It is also your prerogative to accept part of the testimony of any witness and reject another part.

I think you will find in the course of the development of this case that there is practically no difference as to the facts. However, you are not to take my recollection on that, but your recollection, because you are the sole judges of the facts, and that is your responsibility and not mine.

The particular issue as to the facts, it seems to the Court, arises out of the interpretation that is to be placed upon facts, most of which is conceded.

This case, Mr. Foreman and Gentlemen of the Jury, deserves and is entitled to receive at your hands the same earnest, faithful and constant consideration that is ac-

recorded in every case. Every defendant charged with crime in this Court, whether his station in life is high or low, is entitled to the honest judgment of an honest juror upon every legitimate fact and issue, or, rather, upon every fact that is legitimately an issue. That is true in this case just as it is true in all cases.

Consequently, the jury is not charged with any duty or responsibility for the effect or punishment. That responsibility falls upon the Court when the verdict of the jury has been rendered as to the facts.

What I want to impress you with on your part is to settle the issues of fact; and if settlement of the issues of fact calls for punishment or if it calls for turning the defendant loose, you have discharged your duties when you have returned a true verdict. You are not responsible for the consequences.

If this defendant is not guilty, you will say "Not guilty" in the form of your verdict; but if you believe that he is guilty, you will say "Guilty" in the form of your verdict.

I hardly think it is worth while to take the time to review the testimony in this case, as I might, because, as I have already said to you, it covers such a narrow issue that I am quite sure that every member of the jury can remember practically everything that was testified to and, certainly, as to the record evidence you will have the highest evidence of what that was with you in the jury room.

Now, Mr. Foreman and Gentlemen of the Jury, there are two forms of verdict that you can return in this case. One is guilty and the other is not guilty.

If you are satisfied of the defendant's guilt by the measure of proof that I charge you, that is, beyond a reasonable doubt, then the form of your verdict will be "Guilty."

If you have a reasonable doubt whether the defendant is guilty as charged, then the form of your verdict will be "Not guilty."

It takes all twelve of you gentlemen to return a verdict

of "Guilty" or "Not guilty."

On the back of the Indictment, which I shall hand to you, Mr. Foreman, you will find these words, "We, the jury, find the defendant Louis Dabney Smith blank this blank day of November 1944. Now, in that first blank you will write either "Guilty" or "not guilty", depending upon which verdict you agree upon. When you have done that, if you do agree, then write the date in the blank provided for that purpose, and write your name on the blank line above the word "Foreman," and notify the Marshal that you have agreed.

Mr. Powell: The defendant respectfully excepts to the Court's charge: First, on failure to charge the part of Requests No. 5 and No. 6 as given, and No. 7, and for not giving charges 8 to 39, inclusive, and for not charging the remainder of 40. Also for not charging 41 to 44, inclusive.

The Court: In other words, you are excepting to the failure of the Court to charge the requests in the form requested. All right, let the exception be noted.

Give the jury the exhibits and the Indictment.

Mr. Powell: There was one statement, as I understood it, in your charge where the Court said, "knowingly and wilfully," and then followed that up with, "to be conscious of not being a duty." It seems that on the condition and the statement of, "to be conscious of," could include a person was physically restrained and unable to comply.

The Court: "Knowingly" would also include that case. And for that reason I went on to explain the exceptions to that later on, that if the man was physically restrained, that so long as the restraint existed he could not be held for a failure to perform.

Mr. Powell: And then the explanation of the illustration given by the Court regarding the requirement to go to the front of the building, the explanation was that, as I remember it, that if I had no intention to do so, it would not affect—have any effect upon my going if I was restrained, or

something to that effect.

The Court: I meant to say, and think I did say, if I was required to go to the front of the building, had no intention of going there before the time ~~or~~ at the time, although somebody might have put their hands upon me physically and held me, and that had nothing to do with preventing my absence, then it would not excuse me.

Mr. Cooley: Your Honor please, the point we want to call your attention to is that the defendant himself, in order to be guilty of the failure, he must be able to perform.

The Court: That is a matter for the defense. The Government does not have to prove that he is able to perform. He has offered no evidence that he wasn't able to perform other than that about which I have charged.

Mr. Powell: There is one other feature beside that, may it please the Court, I respectfully except to, and that is this, as I remember the Court said there are other methods provided to protect registrants, and it would seem that the jury upon that statement might reach the conclusion that it would not be necessary for him to be protected now by a favorable judgment, but that he would have other methods later provided for his protection.

The Court: Well, I think I stated to them that we could not review what the Draft Board did or the competency of its classification and all of those preliminary steps, because the law has provided other methods of making those determinations. I think that is right. I excluded that from the consideration of the jury.

Anything further?

The jury then retired to its room and later returned the following verdict:

(We, the jury, find the defendant Louis Dabney Smith guilty this 10th day of November, 1944.

J. S. Rodgers, Jr., Foreman.

**IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT**

Appendix to Brief of Appellee

ORDER TO REPORT FOR INDUCTION

Prepare in Duplicate

Local Board Number 68

47

1316 Washington St.

079

Columbia, Richland County

South Carolina

068

18 September, 1943.

The President of the United States, To Louis Dabney
Smith. Order No. 14022

GREETING:

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the land or naval forces of the United States, you are hereby notified that you have now been selected for training and service therein.

You will, therefore, report to the local board named above at Columbia, S. C., at 8:30 A. M., on the 30th day of September, 1943.

This local board will furnish transportation to an induction station. You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.

Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation

of the Selective Training and Service Act of 1940, as amended, and subjects the violator to fine and imprisonment.

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

— — —, Member or clerk of the Local Board.

(Signed by member or clerk of Local Board No. 68.)

EXCERPTS FROM TESTIMONY

Excerpts from Testimony of Paul H. Leonard, Clerk of Local Board No. 68, Richland County, Columbia, S. C.

Q. Did he report on the 30th of September pursuant to instructions in the Order mailed to him on the 18th of September?

A. No, sir.

Q. How do you know that he did not report?

A. Because I went out to the truck in Columbia. Government transportation was furnished by the Local Board to the Fort. And I had his name together with two other names to determine whether he did report, and he did not answer, and the truck left the office, and he wasn't at the office and didn't report as ordered.

Q. And the Order read for him to report at 8:30 on the morning of the 30th, is that correct?

A. Yes, sir; at the office of the Local Board to the Local Board on the 30th of September, 1943.

Cross-examination:

Q. Did you talk to him (Defendant's Father) prior to the date of induction?

A. Yes.

Q. Did you talk to him relative to the induction of his son?

A. Yes.

Q. Did you tell him that if he carried him out to the Fort or had him carried out it would be proper and all right with your Board?

A. No. . . .

Q. Were any members of the Board present when this conversation with Mr. Smith took place?

A. No.

Q. None were there at that time?

A. No.

Q. Did you receive any direction from the Board as to any arrangement made with Mr. Smith to carry his son to the induction station instead of bringing him to the Board?

A. No.

Q. Nothing was said to you concerning that by any member of the Board?

A. That is right. Nothing was said to me by any member of the Board.

Q. Mr. Leonard, will you state whether or not it is customary for you to allow some to report to the induction center without receiving transportation from the Board?

A. No, sir.

Q. Do you recall any instance in which this has been done?

A. They are called to the Board, and in some instances a selectee has arranged with the Sergeant who comes for them in Government trucks to go out in his own automobile, but the Draft Board has nothing to do with that. It has brought about so much confusion that they do that no more.

Q. But that was the practice back some time ago, wasn't it?

A. That was just exceptional cases.

Q. But there are exceptional cases where that was permitted?

A. That was permitted by the Sergeant who came for them, not the Draft Board. He was present at the board.

EXCEPES FROM TESTIMONY OF LOUIS DABNEY SMITH,
DEFENDANT

Q. What was done then, what did the officer do that took you in charge? If was an Army Officer, was it not?

A. Yes, sir, it was a sergeant.

Q. Sergeant who?

A. I don't know his name.

Q. Well, what did he do?

A. I told him that I was a minister of the Gospel.

Mr. Edens: We object to what he told the Sergeant, your Honor.

The Court: Let him tell what he did.

The Witness: I was a minister of the gospel, and because I knew that the Board was prejudiced against me, and they refused to give me a ministerial classification to excuse me, and that I was not to be inducted into the Army.

Q. And then what took place?

A. I was called over to the Army and Navy Building and asked my preference for the Army or Navy.

Q. And what was your reply?

A. I replied that I chose neither, that I was a minister of the Gospel and I was exempted from military service.

Q. Did you make any statement about your being there?

A. Yes, sir. I explained that I was brought out there against my will, and I explained that I was a minister and could not be inducted into the Army.

Q. Well, what was done then?

A. I was then called into another building where I was finger printed and questioned.

Q. What questions were you asked?

A. They were questions relating to my home and name and family.

Q. And occupation?

A. And occupation.

Q. And what answer did you make to the question?

A. Well, I stated that I was a minister of the Gospel, and again that the Board was prejudiced against Jehovah's Witnesses and as a result they refused to classify me as a minister, and I wanted to be released.

Q. Then what was done, Mr. Smith?

A. I was then called with the group of other—the same group over to another building for the oath of enlistment to be read?

Q. Was the oath read?

A. Yes, sir, it was read.

Q. Were you there with the group to whom it was read?

A. I was aside from the group.

Q. Just state how it took place.

A. Well, the officer there or Sergeant in charge explained that any one who—if there was any one present who desired not to take the oath to stand aside and raise their hand, and I did.

Q. You did what?

A. I raised my hand, and he said, "Step aside from the group."

Q. What did you do?

A. I stepped aside. . . .

Cross-examination.

Questions by Mr. Edens:

Q. On the morning of September 30th, Mr. Smith, what did you propose to do that morning?

Mr. Powell: I object to that. I object to the form of the question.

The Court: Objection overruled.

Questions by Mr. Edens:

Q. Where did you plan to go the morning that the men came for you?

Mr. Powell: I object to that.

The Court: Objection overruled. I have already overruled it once.

Mr. Powell: It is not the same question.

The Court: No, it is a different question.

The Witness: Is it necessary for me to answer this question?

The Court: Yes. Go ahead.

Mr. Powell: Does the defendant have to answer questions if they violate his Constitutional right?

The Court: He has offered himself as a witness and is subject to cross-examination and the same rules apply to him as to any other witness.

Mr. Powell: We object to the ruling of the Court.

The Court: All right.

Mr. Powell: On the ground that he has a right to refrain from answering any question that he thinks would violate his Constitutional rights.

The Court: It is a novel objection and it is overruled. Go ahead.

Questions by Mr. Edens:

Q. I have asked the question twice. Will you answer it, sir?

A. Will you repeat it?

Q. Where did you plan to go on the morning of September 30th?

A. I planned to go to the U. S. Commissioner's Office.

Q. You had received your order to Report for Induction on September 30th at 8:30, that is correct, isn't it, Mr. Smith?

A. I received an Order. I don't know whether it came from the Local Board.

Q. You know what it said?

Questions by the Court:

Q. Did it purport to come from the Local Board?

A. Yes, sir.

Q. Did you have any doubt about it coming from the Local Board?

A. No, sir.

Q. Did you intend to obey it?

A. Do I have to answer that?

Q. Yes.

A. No, sir, I did not.

Q. You would not have reported anyway, is that what you said?

A. I wasn't supposed to report.

Q. I asked you would you have reported.

A. No, sir, I would not.

Q. So that didn't keep you from reporting?

Mr. Powell: We object to those answers and questions too on the ground that that isn't related to the question at issue. What he did is related to the question. A man might — his actions is what would determine the question in this case.

The Court: Objection overruled.

Mr. Powell: Exception.

The Court: Yes, note an exception.

Questions by Mr. Edens:

Q. After you arrived at the Fort did you at any time propose to submit yourself for induction into the United States Army or did you do anything —

Mr. Powell: I object to that on the ground that this witness is not being charged with the refusal to be inducted, but the charge is merely reporting, and it really has no bearing on the issue.

The Court: It seems to me that the counsel for the witness or defendant has undertaken to develop a line of testimony upon which they expect to predicate a plea that he has already reported for induction, and, in fact, the counsel has already made that statement in open court, and I think he may be cross-examined along that line.

Mr. Powell: May it please the Court, the basis of our objection is this, is that his action is what counts, what he did, on this occasion is relevant, but what he had in his mind is not relevant, that his actions must determine the entire question at issue.

The Court: What a man has in mind does not concern his intent as to whether it is wilful or not?

Mr. Powell: No, sir.

The Court: Objection overruled.

Mr. Powell: Exception.

Questions by Mr. Edens:

Q. Did you at any stage of the proceedings after you arrived at Fort Jackson propose to submit to induction into the United States Army?

Mr. Powell: I object to that, may it please the Court.

The Court: All right. Overruled.

The Witness: At any stage?

Mr. Edens: Correct.

A. Yes, sir.

Q. At what stage did you propose to refuse to be inducted into the United States Army?

A. I refused to take the oath.

Q. At any stage did you propose or plan or agree or intend to submit to induction into the Army?

Mr. Powell: I object to the form of the question. Nothing definite about that. It is too indefinite.

Questions by Mr. Edens:

Q. Or intend then, did you or not?

Mr. Powell: That calls for a mental state of mind too.

The Court: Objection overruled. Go ahead, answer it.

Questions by Mr. Edens:

Q. Did you intend or agree at any stage of the proceedings at Fort Jackson after you arrived there to submit to induction into the United States Army?

A. No, I did not intend to.

Q. At any time you did not ever intend to, did you, Mr. Smith?

A. No, sir, I did not.

Mr. Powell: We object to that on the same ground.

The Court: Objection overruled.

Mr. Powell: Exception reserved. If it please the Court, I would like to state this as a part of my exception, a person may intend one thing at one minute and an entirely different thing at another moment, and mere intention only, not coupled with a course of action, could not determine the matter in question.

Mr. Edens: My question was directed at any time.

The Court: I don't want any argument. The question is overruled.

Questions by Mr. Edens:

Q. Mr. Smith, you knew and now know that at the time the men came by for you at your home on the morning of September 30th it was after the time you were supposed to have reported to your Local Board?

A. No, sir, it was not.

Q. Your Order said for you to report to your Local Board at 8:30?

A. I understand it did, and they called at 9:00 o'clock.

Q. You didn't bother to read the Order from the Local Board?

A. Yes, sir, I did.

Q. Have you got it with you?

A. No, sir.

Q. Has your counsel got it?

A. I don't know.

Q. Do you know that your Order did read report at 8:30?

A. I was mistaken.

Q. Did you intend to report at 9:00 o'clock to your Local Board?

A. No, sir.

Questions by the Court:

Q. Well, was it after 8:30 when the men came to your home?

A. No, sir; it was before.

Questions by Mr. Edens:

Q. Well, why did you say it was between 8:30 and 9:00 that they came?

A. Because I thought the order to report was at 9:00 o'clock for induction.

Q. And you said the time that they came was before 8:30 and 9:00?

A. Yes, sir; it was.

Q. Well, what time do you say now it was that they came by?

A. I am not definite on the exact time, but I knew it was around 8:15 or 8:30, between 8:00 and 8:30. I could not tell you the exact time.

Q. What is that you have in your hand?

A. That is the Holy Bible.

Q. Have you ever told anybody else it was 8:15 that those men came by?

A. I don't know.

Q. And didn't you tell the F. B. I. agent when he interviewed you that it was after 8:30 when those men came by?

A. I don't remember whether it was or not.

Q. Well, you don't know that when the F. B. I. agent came by you told him that it was between 8:30 and 9:00 that they came for you?

A. I do not remember what I told him; but it was prior to the time to report for induction. How much, I don't know.

Q. That is your signature, isn't it?

A. Yes, sir, it is.

Q. Is that your handwriting?

A. No, sir.

Q. That is not your handwriting?

A. No, sir.

Q. But you did sign this statement?

A. Yes, sir, I did.

Q. Do you mind reading this portion relating to your statement with reference to the time the men came by, from here to right through the portion relating to the time?

A. "I received an Order to report to the Local Board 68 at Columbia, S. C. on September 30, 1943. I did not intend to report for induction on that date. However, I did intend to go see the United States Commissioner Sloan to explain the reason why I would not report on the morning of Sep-

tember 30, 1943." etc. * * * "and took me to the Provost Marshal's Office."

Q. That is enough. That was your statement shortly after this occurred, that was your statement on May 16, 1944?

A. Yes, sir. It was.

Q. And you did refuse to take the oath when it was administered by the proper officer at the Induction Center?

The Court: He has already said that. You need not go over it. He said he stood aside and would not take it.

Excerpts from Testimony of LOUIS SMITH, Father of Defendant:

Cross-examination:

Q. Mr. Smith, you thought it was the boy's place in the United States Army?

A. I thought he should go.

Q. Along with other United States citizens?

A. Yes, sir.

Q. And he told you that he wasn't going?

A. Yes.

Q. And it was because he told you that he wasn't going that you did all you could to get him to go?

A. That is right.

Q. And you felt as an American citizen and his father it was your duty to take him out?

A. Yes, sir: that is why I did it.

Q. And you thought if you got him there he would take the oath as a soldier?

A. Yes, sir.

Q. And he refused to take the oath?

A. They told me that he didn't. * * *

SELECTIVE SERVICE FORMS

605.51. Forms made part of regulations. (a) All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein,

and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether heretofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement.

[fol. 59] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH, Appellant,

VERSUS

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the
Eastern District of South Carolina, at Columbia

November 28, 1944, duplicate notice of appeal is filed and
the cause is docketed.

Memo. of Clerk: The notice of appeal appears on page 14
of the complete transcript of record and is, therefore,
omitted here.

Same day, clerk's statement of docket entries is filed.

Same day, the appearance of Curran E. Cooley and
Grover C. Powell is entered for the appellant.

December 5, 1944, the appearance of Henry H. Edens,
Assistant U. S. Attorney, is entered for the appellee.

December 15, 1944, certified copy of order extending time
for filing bill of exceptions and assignment of errors is filed.

Memo. of Clerk: This order appears on page 17 of the
complete transcript of record and is, therefore, omitted
here.

January 27, 1945, the transcript of record is filed.

Same day, the original exhibits are certified up.

February 8, 1945, the appearance of Louis M. Shimel,
Assistant U. S. Attorney, and Irving S. Shapiro, Attorney,
Department of Justice, is entered for the appellee.

[fol. 60] Same day, the appearance of Hayden C. Covington
is entered for the appellant.

Same day, statement under section 3 of rule 10 is filed.

February 16, 1945, notice of and motion of appellant for
extension of time to file brief and appendix are filed.

ORDER EXTENDING TIME FOR FILING BRIEFS AND APPENDICES—
Filed February 19, 1945

[Style of Court and Title omitted]

Upon the Application of the Appellant, by his counsel, and for good cause shown,

It Is Ordered that the time for the filing of the Appellant's brief and appendix in the above entitled cause be, and the same is hereby, extended to and including February 28, 1945, and that the time for the filing of the Appellee's brief and appendix be, and the same is hereby, extended to and including March 9, 1945.

February 17, 1945.

John J. Parker, Senior Circuit Judge.

February 23, 1945, appendix to brief of appellant is filed.

February 28, 1945, brief on behalf of the appellant is filed.

March 9, 1945, brief and appendix on behalf of the appellee are filed.

ARGUMENT OF CAUSE

March 12, 1945 (March term, 1945), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges; and was argued by counsel and submitted.

[fol. 61]

OPINION—Filed April 4, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Columbia

(Argued March 12, 1945. Decided April 4, 1945)

Before Parker, Soper and Dobie, Circuit Judges

Hayden C. Covington (Curran E. Cooley and Grover C. Powell on brief) for Appellant, and Louis M. Shimel, Assistant U. S. Attorney; Irving S. Shapiro, Attorney,

[fol. 62] Department of Justice, and Henry H. Edens, Assistant U. S. Attorney, (C. N. Sapp, U. S. Attorney, and Nathan T. Elliff, Special Assistant to the Attorney General, on brief) for Appellee.

PARKER, Circuit Judge:

This is an appeal from a conviction and sentence under an indictment charging violation of the Selective Training and Service Act of 1940, 50 U. S. C. A. Appendix sec. 301 et seq., in failing to report for induction pursuant to the order of a local draft board. Defendant is a member of the sect known as Jehovah's Witnesses and claims exemption from the provisions of the Act on the ground that he is a minister of religion. This claim was denied by the local board and he was classified 1-A and ordered to report for induction. The appeal presents two questions: (1) whether the trial court erred in refusing to direct a verdict for defendant on the facts relating to the refusal to report, and (2) whether the court erred in excluding evidence as to the ministerial status of defendant. Both questions, we think, must be answered in the negative.

The facts with respect to defendant's failure to report are as follows: Defendant was ordered by the draft board to report to the board at its office in Columbia, S. C., for induction at 8:30 A. M., September 30, 1943. He made up his mind not to report and so notified his father, who was anxious that he report and be inducted. His father arranged with a state magistrate and two local officers to take defendant by force and carry him to the induction center at the time fixed for induction. On the morning of September [fol. 63] 30th, defendant, who lived two miles from the office of the board where he was required to report, was making no effort to report but, between 8 and 8:30 in the morning, was at his home engaged in shaving, and intending thereafter, not to report to the draft board, but to a United States Commissioner and explain why he had not complied with the board's order. While he was so engaged, the magistrate and officers who had been employed by his father arrived at his home and by a show of force compelled him to go with them to the induction center at Fort Jackson near Columbia, S. C., where they turned him over to the officers of the army charged with the duty of inducting draftees. Defendant notified these officers that he was a minister of the Gospel and that he refused to be inducted

into the army. He was finger printed and examined by them, but refused to take an oath or go through the induction ceremony, protesting throughout the proceedings that he would not be inducted.

At the conclusion of the induction ceremony in which other draftees participated, defendant was notified that he was in the army, notwithstanding his refusal to be inducted. He was granted a three weeks leave along with the other draftees and was ordered to return to Fort Jackson three weeks later. He returned in accordance with this order but refused to put on the army uniform or obey orders. He was tried by a court martial for disobedience of orders and sentenced to a term of imprisonment but, after the decision in *Billings v. Truesdell*, 321 U. S. 542, was released on habeas corpus. He was then indicted in the court below for failure to report for induction as ordered by the draft board. [fol. 64] Upon the facts as stated, there was no error in refusing to direct a verdict of not guilty; for defendant was guilty, on his own admissions, of failing to report for induction as ordered by the board. Not only does he admit that he did not intend to report and remained at home when he would necessarily have been on his way to the board's office if he had intended to comply with its order, but also that, after he had been forcibly carried to the place of induction, he persistently maintained an attitude of defiance and repeatedly stated that he would not be inducted. To report for induction means to present oneself not only at the appointed place but also in readiness "to go through the process which constitutes induction into the army." *United States v. Collura*, 2 Cir. 139 F. 2d 345, approved in *Billings v. Truesdell*, 321 U. S. 542 at 557. Certainly one who has made up his mind not to report for induction and who, after having been dragged by force to the induction center, persistently refuses to go through the process of induction, cannot be said to have reported for induction as ordered by the board, within any possible meaning that can be given to that language.

Defendant makes two arguments which are in large measure inconsistent with each other. One is that the forcible seizure made it impossible for him to report to the board and thus excuses the failure to report; the other, that he was actually present at the induction center and thus substantially complied with the order of the board. A forcible seizure which made it impossible to comply with the board's

order would doubtless be a defense; but nothing of the sort is involved here. The seizure made it, not impossible, but possible, for defendant to comply; and, with the opportunity [fol. 65] for compliance at hand, he failed to avail himself of it. Likewise, presence at the induction center, rather than at the board's office, would doubtless be sufficient compliance on the part of one who was attempting to comply with the order to report for induction, but not on the part of one who had been carried there against his will and who, being there, persistently refused to be inducted. One ordered to report for induction who presents himself at the place designated with the statement that he does not intend to be inducted at all, can hardly be said to have reported for induction. A fortiori, one who is present at the place of induction only because he is carried there by force, and who defiantly refuses induction throughout the period of his presence, cannot be said, in any reasonable sense, to have reported for such purpose. This should be so obvious as not to require statement.

Directly in point is the decision of the Second Circuit in the case of *United States v. Collura*, *supra*, cited with approval by the Supreme Court in *Billings v. Truesdell*, *supra*. In that case, where the charge was failure to report for induction, the draftee appeared at the induction station at the appointed hour but stated that he refused to be inducted unless given a guarantee against compulsory vaccination. In affirming a conviction the court said, 139 F. 2d at 345:

"Obviously the duty to report for induction means more than putting in an appearance at the induction station. The selectee must not only appear but must be ready to go through the process which constitutes induction into the army. Admittedly the appellant did not report for induction, but reported for the purpose of making a bargain with the military authorities and entering the army only if [fol. 66] the terms agreed upon were satisfactory to his personal views as to vaccination."

In the case at bar the draftee did not report for the purpose of making a bargain with the military authorities as a condition of induction. He did not report at all. He was forcibly taken to the induction station and, being there, refused unconditionally to be inducted. See also *United States v. Longo*, 3 Cir. 140 F. 2d 848.

On the second question, we think it clear that the trial court was correct in excluding evidence as to the alleged ministerial status of defendant and refusing to charge the jury with regard thereto. Whether the defendant was entitled to exemption from military service or not on the ground that he was a minister of religion, this was a question of fact committed to the determination of the draft board, with appeal to the appeal board and in a limited number of cases to the President, but with no provision for review by the courts. *United States v. Grieme*, 3 Cir. 128 F. 2d 811, 814-815. It was his duty to comply with the board's orders; and, in a prosecution for failure to do so, no defense based on the invalidity of the orders can be entertained. *Falbo v. United States*, 320 U. S. 549. Compliance with the board's orders includes submitting to induction, which is the last step in the process leading to induction; for "the order of the local board to report for induction includes a command to submit to induction." *Billings v. Truesdell*, 321 U. S. 542, 557. As said by the Supreme Court in the case last cited:

"But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board. It must [fol. 67] be remembered that sec. 11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or the rules or regulations made pursuant thereto.' He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States v. Collura*, *supra*. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express. The Selective Service Regulations state that it is the 'duty' of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished,' and 'to submit to induction.' (Italics supplied.)

Defendant argues that he has exhausted the administrative process, as required by the *Falbo* case, when he has submitted to physical examination and been accepted by the military authorities, and that it is then open to him, if

charged with refusal to obey the board's order with respect to the final matter of submitting to induction, to attack the validity of the order by showing that the board had classified him unreasonably. The trouble with this position is that the administrative process is not exhausted until the order of the board is complied with, which, as we have seen, embraces submitting to induction. When the *Billings* case is considered in connection with the *Falbo* case, there can be no question as to the correctness of this conclusion. In the *Billings* case, the court, after using the language which we have quoted above, goes on to say:

[fol. 68] "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. * * * These considerations together indicate to us that a selectee becomes 'actually inducted' within the meaning of sec. 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

Following the procedure prescribed thus embraces undergoing induction; and not until this has been done may the legality of classification be challenged. *United States v. Rinko*, 7 Cir. 147 F. 2d 1; *United States v. Flakowicz*, 55 F. Supp. 329, Aff. 2 Cir. 146 F. 2d 874. The inductee may, of course, apply for habeas corpus as soon as his induction into the army is completed, and need not wait until he is court-martialed for disobedience of military orders.

This court was of opinion when the cases first arising under the Act came before us that the invalidity of an order of classification arising from the denial of due process might be asserted as a defense to a prosecution for failure to obey the order. See *Barley v. United States*, 134 F. 2d 998, 999; *Goff v. United States*, 135 F. 2d 610. A different view, however, had been taken by the Circuit Court of Appeals of the Third Circuit in *United States v. Grieme*, 128 F. 2d 813, 815, where that court said:

[fol. 69] "We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although

bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts."

In the *Goff case*, *supra*, we expressly referred to the *Grieme case*, and, in justification of not following it, said: "It would seem . . . that the total invalidity of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order." The Supreme Court, however, in the *Falbo case*, after referring to the conflict of view between the *Goff* and *Grieme cases*, adopted the view of the latter; and in his concurring opinion in *Hirabayashi v. United States*, 320 U. S. 81, 108, 109, Mr. Justice Douglas referred to the rule of the *Grieme case* as settled law, saying: "There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that after induction he may obtain through habeas corpus a hearing on the legality of his classification by the draft board." (Italics supplied.) If habeas corpus is the remedy by which the validity of classification is to be tested, then, unquestionably, submission to induction is a necessary [fol. 70] part of the preliminary process; for not until the inductee is actually in the army is he deprived of his liberty so that habeas corpus will lie.

In the *Goff case* we were impressed with the thought that the validity of an order might be challenged wherever failure to comply with it was alleged. The Supreme Court has taken the view, however, that considering the dangers which might flow from delay in time of war, a reasonable interpretation of the Selective Service Act requires that orders of the draft board be complied with and all administrative remedies thereunder be exhausted before they may be challenged in the courts. This is in accord with the holding that the validity of O. P. A. regulations may be

challenged only after administrative procedures have been exhausted, and then only in a particular court. \ Cf. *Yakus v. United States*, 321 U. S. 414, 427-430. Among the advantages in cases such as this of limiting the remedy of the draftee to habeas corpus proceedings commenced after the administrative processes has been completed, is that unnecessary delays in the raising of the army are avoided and questions which are primarily constitutional in character are heard before a judge without the distractions and uncertainties likely to accompany a criminal jury trial. Constitutional rights of citizens must, of course, be preserved in war as well as in peace; but the procedure outlined in the *Falbo* and *Billings* cases enables the courts to preserve them without unduly interfering with the war effort.

An additional reason for sustaining the action of the trial court is that there was nothing tendered by defendant sufficient to show such a denial of due process as would result in invalidity of the draft board's order. It was [fols. 71-72] certainly for the board to say whether a college student eighteen years of age, majoring in engineering, and claiming to be a minister of religion merely because he distributed Bible literature and conducted Bible studies, was a minister of religion within the meaning of the Selective Service Act. See 53 F. Supp. 583-584. The decision of the board was affirmed by the appeal board and by the President; and there was nothing offered to show that in any of the proceedings defendant was denied any constitutional right. Even if the rule of the *Goff case* be applied, therefore, there was no error; for it must be remembered that, with respect to the right to assert the invalidity of the board's order as a defense, we said in that case: "This does not mean that the court in a criminal proceeding may review the action of the board. That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

[fol. 73] JUDGMENT—Filed and Entered April 4, 1945

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for
the Eastern District of South Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On Consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

John J. Parker, Senior Circuit Judge. Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

April 9, 1945, petition of appellant for a stay of mandate is filed.

ORDER STAYING MANDATE—Filed and Entered April 9, 1945

(Style of Court and Title Omitted)

Upon the Application of the appellant, by his counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending [fol. 74] the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided said application is filed in the said Supreme Court within 20 days from this date.

April 9th, 1945.

John J. Parker, Senior Circuit Judge.

[fol. 75] UNITED STATES SUPREME COURT, OCTOBER TERM,
1944

Number —

LOUIS DABNEY SMITH, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the United States
Fourth Circuit Court of Appeals at No. 5329 CCA-4

STIPULATION

Subject to the approval of this court, it is hereby stipulated and agreed by and between attorneys for the respective parties hereto, that, for the purpose of the petition for a writ of certiorari, the printed record shall consist of the following documents:

1) Printed appendix filed by appellant, Louis Dabney Smith, in the circuit court of appeals.

2) Printed appendix filed by appellee in the circuit court of appeals.

3) One copy of the opinion of the United States Fourth Circuit Court of Appeals, dated April 4, 1945, and filed in this cause.

4) One copy of the judgment of said circuit court of appeals rendered on April 4, 1945, pursuant to the opinion filed herein.

5) One copy of the order staying the mandate pending application in the Supreme Court of the United States for a writ of certiorari to the Fourth Circuit Court of Appeals.

6) One copy of the docket entries of the clerk showing the nature of all papers filed herein, and the date of filing of each, together with a minute of all actions taken by the court in this cause, in the said circuit court of appeals.

7) A copy of this stipulation.

It is further stipulated and agreed that petitioner will cause the clerk of said circuit court of appeals to certify to the Supreme Court all exhibits not reproduced in the

printed appendices before the circuit court of appeals, including petitioner's Selective Service file, and that reference may be had to such exhibits with the same force and effect as though incorporated in the printed record.

[fol. 76] It is further stipulated and agreed that the Clerk of the United States Fourth Circuit Court of Appeals may certify the above named documents to be the entire designated record as stipulated and agreed upon by the parties, said certificate to be included as the last document in the book or binder comprising said record.

Dated, April 16, 1945.

Charles Fahy, Solicitor General of the United States,
Counsel for Respondent; Hayden C. Covington,
Counsel for Petitioner.

[fol. 77]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief of appellant; appendix to brief of appellee, and the proceedings in the said Circuit Court of Appeals, including opinion, judgment, order staying mandate, docket entries, and stipulation as to record, in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals and, together with the original exhibits certified separately, constitute and is the entire designated record as stipulated and agreed upon by the parties, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 17th day of April, A. D., 1945.

Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 28, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

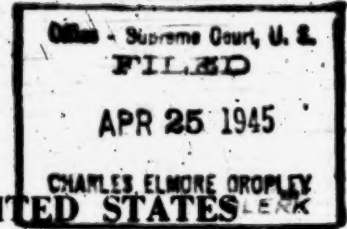
And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(9607)

FILE COPY

No. **4177** **66**



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**Petition for Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fourth Circuit**

HAYDEN C. COVINGTON
Attorney for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

■
LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■
**Petition for Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fourth Circuit**

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Louis Dabney Smith, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Preliminary Statement.*

The questions presented by this petition upon the issues raised in the courts below have neither been decided nor foreclosed by the decision in *Falbo v. United States*, 320 U.S. 549. Indeed the dictum in *Billings v. Truesdell*, 321 U.S. 542, 558-559 supports the substantial question here presented, namely, whether petitioner, who has completed the selective process by acceptance on a preinduction physical examination and who is charged by indictment with refusal to report for induction into the armed forces pur-

2

suant to the Selective Training and Service Act may show, in defense to the indictment, that the orders on which the charges are based are void, illegal and contrary to law. If the Act and the Regulations are construed so as to require a registrant, who is exempt from all training and service, to report for induction as a condition precedent for obtaining judicial review of the illegality of the administrative orders, that the Act and Regulations are unconstitutional. None of these issues were presented in the *Falbo* case. Furthermore, the facts in this case are entirely different. Here the petitioner has completely exhausted all administrative remedies by acceptance following his pre-induction physical examination by the armed forces.

2. *Opinion of Court Below.*

The opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record certified to this Court. []* The entire opinion appears also as an *appendix* of this petition.

3. *Statutory Provisions Sustaining Jurisdiction.*

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. *Timeliness of this Petition.*

The decision of the Circuit Court of Appeals was entered on April 4, 1945. The judgment of the court below became final on April 4, 1945.

5. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U. S. C., Appendix ss. 301-318) are drawn in question here, together

* Figures appearing in brackets throughout this petition and the supporting brief refer to pages of the printed transcript of the record.

with Sections 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 629.4-629.35, 633.2, 633.21, 642.41 and 642.42 of the Selective Service Regulations* (32 C. F. R. Supp., 601.5 et seq.) promulgated by the President under said Act.

6. *Constitutional Provisions Involved.*

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. *Questions Presented.*

1. Does petitioner's failure to report to his local board at the time specified in the order of induction become immaterial in light of the conceded fact that he subsequently appeared at the induction station, joined with the group of inductees sent there from his local board, submitted to the final physical examination, was accepted by the armed forces and was granted a furlough and subsequently court-martialed for failure to perform military duty?

2. Does the conceded fact that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board for induction, constitute a valid defense to the indictment charging him with criminal failure to appear at the local board?

3. Did the appearance of petitioner at the induction station, pursuant to the order to report, and his failure to submit to induction constitute a failure to report for induction within the meaning of the Act and Regulations?

4. Did the intent on the part of petitioner not to report for induction justify the conviction in spite of the fact that

*The Regulations are amended frequently. The sections are here set out as they existed when the facts in controversy took place.

he was imprisoned at the time he was required to report and later appeared at the induction station and submitted to the administrative process up to the point of refusal to submit to induction?

5. Did the trial court err in charging the jury that petitioner's appearance at the induction station and acceptance by the armed forces, as well as petitioner's contentions that he was falsely imprisoned, were immaterial?

6. Did the trial court err in refusing to allow petitioner the right to show, and in refusing to permit the jury to consider, the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

7. Did the trial court err in charging the jury that it could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided by the jury to whether or not petitioner knowingly failed to report at the local board as specified in the induction order?

8. Did the trial court err in refusing to give petitioner requested charges permitting the jury to consider whether or not the boards had acted in an illegal and unconstitutional manner in classifying petitioner and in ordering him to report for induction?

9. Does acceptance by the armed forces at the induction station complete the administrative process so as to permit judicial review of the illegal classification in defense to the indictment based on petitioner's failure to report at the local board as specified in the induction order?

Statement of the Case

FORM OF ACTION

This criminal action was begun by indictment returned against petitioner, Louis Dabney Smith, in the United States District Court of the Eastern District of South Carolina, Columbia Division, on November 7, 1944. [2] Defendant was charged with failing to perform a duty required of him under the Selective Training and Service Act of 1940, as amended, and the Regulations promulgated thereunder, in that he "unlawfully, knowingly and wilfully failed and neglected to . . . report for induction as ordered by the said local board."

Petitioner urged a plea in bar, which was denied. He then urged a motion to quash [3-5] which was denied. [5] Upon a plea of "not guilty" [6] trial to a jury began on November 9, 1944, before the Honorable George Bell Timmerman, United States District Judge. At the close of all the evidence, petitioner moved for a directed verdict of "not guilty", in which the reasons were extensively stated. [25-28] On denial thereof, petitioner duly excepted. At the close of all the evidence, petitioner submitted to the court his requested charges, [35-38] Counsel summed up the evidence and the court charged the jury. [28-40] Petitioner objected and excepted to the court's charge. [40-41] The court refused certain of petitioner's requested charges with exceptions to petitioner. [35-41] The jury returned a verdict of "guilty". [41] Thereafter, on November 10, 1944, petitioner was sentenced to three and one-half years and committed to the custody of the Attorney General for confinement in a federal institution. [1]

FACTS

Louis Dabney Smith is a minister of Jehovah's witnesses and has been for several years. [9] For four years prior to the filing of his Selective Service questionnaire, he had been a minister preaching from house to house in the same manner as did Christ Jesus and His apostles, as shown at Acts 20: 20 and Luke 8: 1. He had been formally ordained. The record also disclosed that he was eighteen years of age on October 4, 1942; that he registered with his local board during the week of December 18, 1942; filed his questionnaire with which he submitted proof of his ministry; that he was living with his parents, receiving support from them; and that he was a student at the University of South Carolina.

After considering the evidence, the local board placed him in Class I-A on April 2, 1943. He was granted a personal appearance before the board, and on May 18, 1943, the local board continued his I-A classification. On May 25, 1943, he appealed for class IV-D to the board of appeal, and on June 17, 1943, such board affirmed the classification by a vote of 4 to 1. On June 22, 1943, he appealed to the President and the classification was affirmed. On September 18, 1943, he was ordered to report for induction on September 30, 1943. [7]

Petitioner's father suspected that he might be planning to refuse to report for induction on September 30, 1943, [22, 23] and about three days prior thereto he went to the local board and asked that the board have two detectives come to his home and take the petitioner to the induction station, but was advised that the local board had no police authority. [22] Thereupon, the father paid several local police officers (Magistrate Ollie Mefford and Constables Hough and Thornton) a sum of money to forcibly take petitioner to Fort Jackson, South Carolina, on September 30, 1943, and there deliver him for induction. [23]

On the morning of September 30, 1943, at 8 a.m., Magis-

Magistrate Mefford and Constables Hough and Thornton drove up in the driveway of the Smith home. Petitioner's mother saw them as they got out of the car and started toward the house. [24] She ran upstairs to the bathroom where petitioner was shaving and preparing to dress, and by the time she reached there, the three men had entered the home and were behind her. [11] When petitioner came out of the bathroom, he asked the men if they had a warrant for his arrest, and they told him that they needed no warrant. One of the men pulled up his coat and displayed a pistol and commanded petitioner to accompany them. [12] Thinking they were federal agents, and that he was under arrest and in their custody petitioner surrendered himself to them. [12]

Magistrate Mefford and Constables Hough and Thornton placed petitioner in their car and drove him to the induction station at Fort Jackson, where they turned him over to the military authorities. [12-13] Petitioner told the authorities that he was a minister of the gospel and had been wrongly classified. [13, 15] The sergeant at the desk at the induction station then telephoned Mr. Leonard, the clerk of the local board, verified petitioner's classification and advised the clerk that petitioner was then at the induction station. [13] He asked the clerk if petitioner was supposed to be inducted into the army that day. The petitioner was asked by counsel, "What did Mr. Leonard have to say? A. He told me that Mr. Leonard said I was supposed to be inducted into the army that day. Q. And did he say that he should send you back over to the Board to be transported back to Fort Jackson? A. No sir." [14]

Petitioner was then taken to another building at the fort, where he awaited the arrival of the other men from the induction center. [14] He was then put with this group of men and given a final physical examination in due course. He remained with this group until he was advised that he had passed the physical examination and was declared

acceptable by the armed forces. He then went to the sergeant and advised him that he had not taken the oath and would continue to refuse to submit to it and would not put on the uniform. [16] Thereupon the sergeant read to petitioner the Articles of War covering men who refused to take the oath and advised him that regardless of whether he took the oath or not, he was subject to the Articles of War and in the army. [16] Petitioner still refused to take the oath and submit to induction and was again advised that he was subject to the Articles of War. [17] He was permitted to leave Fort Jackson on October 1, 1943, and received orders to report back in 21 days. [17] At the end of the 21 days he returned to the Fort and asked permission to see the commanding officer at the reception center. [18] He saw the officer and told him that he was a minister of Jehovah's witnesses; that he was deprived of a IV-D classification because of prejudice on the part of the local board [18]; that he was brought to the induction station against his will, and desired to be released. He was advised that he would not be released, whereupon petitioner told the officer that his obligation and mission in life was the preaching of the gospel of God's Kingdom, and that he had so consecrated his life to do the will of Almighty God. [19] Petitioner was then taken to the infirmary and then, on his refusal to don the uniform, the officers in charge attempted to force the uniform on him. [19] For disobeying the orders of the sergeant and other officers, he was charged with violating the Articles of War, court-martialed and sentenced to serve 25 years in prison. [19]

Thereafter, petitioner filed in the United States District Court in the Eastern District of South Carolina, a petition for writ of habeas corpus, alleging that the court-martial's judgment was entered without jurisdiction, since petitioner was not legally inducted into the army, not having subscribed to the formal military oath. On January 27, 1944, the United States District Court discharged the petition

for the writ and remanded petitioner to custody of the military authorities. (*Smith v. Rickart, Colonel*, 53 F. Supp. 582)

Petitioner thereupon appealed to the Circuit Court (No. 5237, April Term 1944). While said appeal was pending, the Supreme Court of the United States in *Billings v. Truesdell*, 321 U. S. 542, held that military jurisdiction did not begin, under the existing Regulations, until the registrant had submitted to the oath of induction. Counsel then stipulated for a reversal of the judgment of the United States District Court and, on April 18, 1944, Judge John J. Parker accordingly entered a judgment reversing the United States District Court on the authority of the *Billings* decision and remanding the case to the United States District Court. Petitioner was thereafter released from military custody, and soon thereafter this criminal proceeding was instituted.

HOW ISSUES RAISED

By a plea in bar, defendant urged (1)-that he did report to the induction station at Fort Jackson, where he was received by the army on the date specified in the induction order; (2) that he thereafter applied for and on December 9, 1943, obtained from the United States Courts, a writ of habeas corpus ordering his discharge from the army, said writ effecting his release on April 29, 1944; (3) that in issuing said writ of habeas corpus, the District Court held that defendant had reported for induction in obedience to the order of his board and that for this reason the issue was res judicata. This plea was overruled.

By motion to quash, defendant claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and order made by the draft boards. [3-4] He contended that if the right to urge this defense was denied him, a construction had been placed on the Act and Regulations

which made them unconstitutional. [4] Petitioner alleged that they were void because (1) they constituted a Bill of Attainder, contrary to clause 3 in section 9 of Article I of the Constitution; (2) surrendered the judicial powers to the draft board, contrary to Article III of the Constitution; (3) denied the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment to the Constitution; (4) denied the right of a jury trial and the right to have the jury determine guilt or innocence, contrary to the Sixth Amendment to the Constitution; (5) permitted conviction without evidence of guilt and upon hearsay evidence and denied right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments to the Constitution. [4] The court overruled the motion to quash. [5]

At the close of all the evidence, petitioner moved for a directed verdict on the grounds that the evidence showed that he was not guilty of violating the Act in that he did report at the induction station as ordered, thereby rendering immaterial his failure to report at the local board. The reasons asserted in the motion to quash were reiterated in the motion for directed verdict. [25-27]

The court charged the jury that (1) the evidence showing that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board and that he had appeared at the induction station and was accepted for military service, was immaterial to the issues in the case (thus in effect instructing the jury to find petitioner guilty) [32, 40-41]; (2) the classification made by the boards was binding upon petitioner, the court and jury [33]; (3) petitioner's failure to appear at the local board was a violation of the Act. [32, 33, 35] Petitioner's exceptions to such charge were duly noted. [40, 41]

Petitioner's requested charges urging that the classifica-

tion and order thereon were illegal and void, and requesting the submission to the jury of the issue of his false imprisonment at the time he was scheduled to report at the local board were refused, with exceptions to the petitioner. [35, 36, 37, 40] The requests, in the terms of the Act and Regulations, defined what constitutes a regular and duly ordained minister of religion. [36, 37] Also the requests stated the duties of the draft boards in considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. The court was requested to instruct the jury that if the jury found that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses, and there was no substantial evidence that he was not such minister as claimed, the jury could find that the draft boards acted in excess of authority; without justification; contrary to law; without support of substantial evidence; contrary to the undisputed evidence; contrary to the Constitution, the Act and Regulations; and arbitrarily and capriciously; thereby rendering a verdict of "not guilty" if they so found. [37] Petitioner excepted to the court's charge as a whole for failure to charge as requested in defendant's requested instructions. [40].

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction.

Reasons Relied on for Granting the Writ

The court below has decided that forcible restraint of petitioner at the time he was required to appear at the board was no defense to an indictment charging him with failure to report because he intended not to comply with the order. Moreover, the court below held that substantial

compliance with the order to report by appearance at the induction station, undergoing the physical examination that completed the selective process, and his subsequent refusal to be inducted was not a defense to an indictment charging him with failure to report for induction. The court below held that one who refuses to submit to induction is guilty of failing to report for induction, in spite of the fact that this court has said that failure to submit to induction is equally an offense under the Act as is failure to report for induction. (*Billings v. Truesdell*, 321 U.S. 542) Despite the fact that failure to report for induction is a different offense under the Act—one distinct from the offense of failure to submit to induction—the court below has held that the offenses are the same. The court holds that failure to submit to induction is failure to report for induction. This anomalous decision makes a dragnet out of an indictment charging one with failure to report for induction. Hence a person thus indicted under the Act would believe that he would be put to trial for failure to appear at the board, and upon the trial would find that he was being tried, not for failure to appear but for his failure to comply with some order or command given him after appearing as commanded. The vagueness of the indictment in this respect was challenged in the petitioner's motion to quash. (APPENDIX for Appellant's Brief in CCA-4, page 3) The undisputed evidence shows that the petitioner is not guilty of failure to report for induction. The evidence shows that if he is guilty of any offense under the Act it is failure to submit to induction. He was illegally tried and convicted of failing to report. If this aberration in criminal procedure is allowed to stand, then a way has been found to circumvent the fundamental guarantees written into the Bill of Rights concerning rights of defendants in criminal cases.

The error of the holding can best be shown by stating a hypothetical case. Assume that a person is charged with burglary of a store, which is an offense distinct from theft.

Suppose the proof showed that the culprit entered the open door of the store and stole some personal property by "shoplifting" and absconded. Under the specious and factitious holding of the court below such a person, although the undisputed evidence showed he was not guilty of burglary but guilty only of theft, could be convicted of burglary. Such a situation is contrary to the spirit of the Constitution and the genius of criminal procedure in the law.

In this respect the holding of the court below is in conflict with applicable decisions of this court and is such a drastic departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. Moreover, the question of whether the offense of failure to report includes the offense of failure to submit to induction is an important question of federal law which has not been, but should be, settled by this court.

The court below stated that this court approved *United States v. Collura*, 139 F. 2d 345 (CCA-2, 1943), by citing that decision in *Billings v. Truesdell*, 321 U. S. 542 at 547, and then the court below declares that the *Collura* case supports the conclusion reached by it. The *Collura* case was not approved by this court. No petition for a writ of certiorari was filed in that case. It is cited in the *Billings* case only for the proposition that one who refuses to be inducted is equally as guilty of violating the Act as one who refuses to report for induction. But in the *Collura* case it was not held that the two offenses were the same, or that refusal to submit to induction was included in the offense of failure to report. Furthermore, the *Collura* case is entirely distinguishable from the facts of this case.

Collura did not complete the "connected series of steps into the national service which begins with registration" and which "does not end until the registrant is accepted by the army, navy, or civilian public service camp." (*Falbo v. United States*, 320 U. S. 549, 553) In other words, *Collura*

was not examined. He did nothing but appear and refuse to go through the physical examination. He did not have the opportunity to refuse to submit to induction as did the petitioner here, who completed the selective process and who refused to submit to induction after reporting at the induction station.

What is here said about the *Collura* case also applies to *United States v. Longo*, 140 F. 2d 848 (CCA-3d 1944). Longo was indicted for failure to report for a medical examination at the medical examination center. He appeared at his board and refused to go further. He left a letter with his board explaining his reasons for his failure to appear at the medical examination center.

The court below decries the position taken by petitioner by saying: "Defendant makes two arguments which are in large measure inconsistent with each other. One is that the forcible seizure made it impossible for him to report to the board and thus excuses the failure to report; the other, that he was actually present at the induction center and thus substantially complied with the order of the board." These arguments are not in the slightest degree inconsistent.

In the first place, petitioner cannot be convicted for failure to appear at the board because it is proved he intended not to appear. Proof of intent is not proof of the overt act. There was no overt act because he was in restraint at the time, so manifestly he could not be guilty of failure to appear at the board. Intent not to appear does not prove failure to appear where undisputed evidence shows he was in restraint.

In the second place, the defendant could not be convicted of violating the Act for failure to appear at the board for the purpose of being transported to the induction station when he, in fact, appeared at the induction station and took the physical examination voluntarily, refused to take the oath, returned to the camp after a 21-day furlough, and thus voluntarily completed the selective process after intending

not to report and being taken, against his will, to the induction station. If he could be convicted for failure to appear at the local board and also for failure to submit to induction then he can be found guilty of two crimes, which allows his being twice put in jeopardy for the same act or omission.

If these two arguments are inconsistent, then also, and for the same reasons, are the arguments of the court below that the petitioner was guilty of failure to report because he (1) refused to submit to induction, and (2) failed to appear at the local board. Moreover, the alternative position of petitioner was made necessary by the inconsistent position taken by the Government, championed by the court below, that petitioner was guilty of failure to report regardless of his reporting at the induction station.

The discussion of the court below that the administrative remedies are not exhausted upon completion of the selective process is sufficient ground for granting the writ of certiorari. The holding is upon an important federal question which has not, but should be, settled by this court. Furthermore, on this point the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. The discussion under "Reasons Relied on for Allowance of Writ" in the petition for writ of certiorari in *Rinko v. United States*, No 1071, October Term 1944, at pages 17 to 24, is applicable here. Accordingly that discussion is referred to and made a part hereof as though copied at length herein. Furthermore, the holding of the court below on this proposition is inconsistent with the dictum of this court in *Billings v. Truesdell*, 321 U. S. 542, at 558 and 559, where it is said that if a registrant who reports to exhaust his remedies is forced to submit to induction it would make a trap of the *Falbo* decision. Although the court below relied upon part of this language of the *Billings* decision as authority for its conclusion, it is to be observed that it studiously avoided that

part of the quotation about making a trap of the *Falbo* decision. The court employed ellipsis marks (* * *) for that part of the quotation.

What was the "trap" which this court spoke of in the *Billings* opinion? Inexorably, it appears to be submission to induction as a condition precedent to judicial review after completion of the selective process which is the "trap" there mentioned. Indeed, if it is not then he who appears to exhaust his remedies is worse off than he who stays away entirely. (Cf. *Ex parte Young*, 209 U. S. 123, 147; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co. v. Love*, 252 U. S. 331.

The court below says that this court, in *Falbo v. United States*, 320 U. S. 549, adopted the view that the only right of review of an illegal draft board order was by habeas corpus after induction. It is significant that the court below does not quote any such language in the *Falbo* opinion that would fairly justify this inference. This court has never held that the only right of review of an illegal draft board order is by habeas corpus after induction. The *Falbo* decision disposed of only the "narrow question" presented, namely, "Is judicial review of the legality of the order available as a defense to the indictment where the administrative procedure (or "selective process") has not run its course?"

The concurring opinion of Mr. Justice Douglas in *Hirabayashi v. United States*, 320 U. S. 81, 108, 109, throws no light on the holding in the *Falbo* case which was decided long after the *Hirabayashi* case. Moreover, the recognition of the line of decisions holding habeas corpus after induction as the only remedy does not constitute an approval thereof. The argument that habeas corpus after induction is the only remedy is based on the decisions under the 1917 Act which was essentially different from the 1940 Act. The very purpose of the Bone amendment to the 1940 Act was to keep registrants with claims for exemption and controversies with draft boards, and who desired to test the ille-

gality of the action of the boards, entirely out of the armed forces. History under the 1917 Act shows habeas corpus frustrated training.

The argument of the court below perverts the present Act into the form of the 1917 Act by an illegal construction, which is reading into the present Act something that is not to be found in the Act, and which is contrary to the genius of the Bone amendment.

The decision of this court in *Yakus v. United States*, 321 U. S. 414, 427-430, is relied upon by the court below as supporting its contention that submission to induction is required to complete all "administrative remedies" by applying for a writ of habeas corpus. The *Yakus* decision is distinguishable because there it was provided in the Act that one dissatisfied with an OPA ruling could appeal to the Emergency Court. In this Act there is no such provision and since habeas corpus is a judicial remedy and is not provided for in the Act as an "administrative" remedy it cannot be argued that the *Yakus* decision is in point. Naturally, if the Act provided for the registrant to appeal to the Emergency Court after appealing to the highest official in the Selective Service System, he must exhaust such remedies. There is no such remedy available here and the *Yakus* decision can be put aside.

It should be observed that the holding of this court in the *Yakus* case was assaulted as an aberration by the Select Committee to Investigate Executive Agencies of the Congress of the United States. (Second Intermediate Report of the Select Committee to Investigate Executive Agencies, H. R. 862, 78th Cong., 1st Sess., p. 5) Moreover, the Congress, by construction of the Price Control Act, remedied the predicament in which this court placed such persons. (See P. L. 383, 78th Cong., 2d Sess., sec. 107.) See VIRGINIA LAW REVIEW, Vol. 31, No. 1, Dec. 1944.

WHEREFORE your petitioner prays that this court issue a writ of certiorari to the Circuit Court of Appeals

for the Fourth Circuit directing such court to certify to this court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or in the alternative the judgment be reversed and the cause remanded for a new trial not inconsistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this court may seem just and proper in the circumstances.

LOUIS DABNEY SMITH, *Petitioner*

By HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

PRELIMINARY

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

The points of law pertaining to the right of the petitioner to show in defense to the indictment that the administrative order is void because the selective process has ended, thus completing the administrative remedies, have been fully discussed in *Rinko v. United States*, No. 1071, October Term 1944. See Petition for Writ of Certiorari, pages 25-34, incorporated herein by reference as though copied at length herein.

ADDITIONAL ARGUMENT

ONE

The trial court erred in overruling motion for dismissal and for directed verdict because petitioner's failure to report to his local board at the time specified in the order was immaterial in light of the conceded fact that he subsequently appeared at the induction station, joined with the group of inductees sent there from his local board, submitted to the final physical examination, was accepted by the armed forces and was granted a furlough and subsequently court-martialed for failure to perform military duty.

It will not be disputed that petitioner appeared at the induction station, joined with his group of inductees, was physically examined and declared acceptable for military service and, despite his protests against being inducted into the army, was advised that he was a member of the armed forces, and was given the customary furlough. Petitioner's local board was immediately notified that he had so reported to the induction station and was protesting against his classification and the order of induction. It is highly significant that the local board did not then complain of the fact that petitioner had not reported to the local board as specified in the induction order but assented to the induction proceedings then taking place. It is further significant to note the words of Judge Wyche in his opinion refusing to discharge petitioner from the army on his petition for writ of habeas corpus: "The object of the order to report was to get him to the Induction Station. He was there when the board received the telephone call from Sergeant Lanier about his classification. Nothing further remained for the board to do in connection with his de-

livery." It cannot be disputed, therefore, that the administrative process that necessarily precedes induction had entirely run its course when petitioner reported at the induction station and was accepted on physical examination by the armed forces. As Judge Wyche pointed out, "Nothing further remained for the board to do." Its function and authority had been completely exhausted.

Notwithstanding the circumstances that the above facts are conceded, the Government has indicted petitioner not for his failure to subscribe to the oath of induction and to be inducted, but for his failure to report at the local board as specified in the order of induction. Whether or not petitioner did report at the local board at the time specified was the sole issue submitted to the jury and is therefore the basis of petitioner's conviction here complained of. The novel and important question is therefore squarely presented, viz., whether or not petitioner's failure to formally report at the local board, as ordered, constitutes a violation of section 11 of the Act when it also appears that he reported to the induction station and, with the knowledge of his local board, proceeded to submit to final physical examination.

Under the Act, failure to report is one offense and refusal to submit to induction is another offense, both of which are created by, and punishable under, section 11 of the Act. In *Billings v. Truesdell*, 321 U. S. 542, 554, 557, the Supreme Court held that "induction follows acceptance and is a separate process. . . . It must be remembered that Sec. 11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution' of the Act 'or rules or regulations made pursuant thereto.' . . . He who reports to the induction station but refuses to be inducted violates Sec. 11 of the Act as clearly as one who *refuses to report at all*." [Italics added] Thus it is clearly settled that the reporting is complete when selectee is physically present at the induction station

at the proper time. In fact, in this case petitioner did more than report. He went through to the end of the selective process by submitting to the examination. Clearly he cannot be tried for refusing to submit to examination, but if this conviction is allowed to stand, he *could* so be tried. The fact that he subsequently refused to be inducted is not admissible evidence in support of this indictment because such circumstance has no probative value as to determining whether he reported or did not report because that is a separate process and hence a separate offense under the Act. There is no escape from that conclusion. He should have been indicted for failure or refusal to submit to induction, if he was to be tried for any offense under the Act.

What the court actually did was to permit a conviction for failure to *report* to be made upon proof that he refused to *submit* to induction, an entirely different offense. It may be argued that this is technical. It may be, but it is also practical and meritorious. The rule requiring an indictment for a felony is also technical as are all rules of law. The practical result of this action of the court will be that, should the conviction be allowed to stand, he can then be indicted for the offense of failure to submit to induction which will result in two convictions for the same act, viz., failure to submit to induction.

Under the Act there are a number of things which selectees are required to do, or duties they are required to perform, the refusal to perform any one of which is a criminal offense, but it is submitted that before a conviction can be lawfully secured the particular violation charged must be alleged and proved. In any event petitioner cannot be convicted where one violation is alleged and another proved.

During the trial, petitioner raised the objection that he was not obliged to testify with respect to his refusal to submit to induction on the ground that such was a separate offense not included in the indictment and that he could not be compelled to give evidence that would tend to in-

criminate him. However the trial court overruled his objection. In so doing, the trial court erred, because, in a prosecution for the one offense of failure to report, petitioner should not have been forced to incriminate himself as to the separate offense of refusing to submit to induction. When a man is being tried for larceny and goes on the stand in his own defense to testify he cannot be forced to admit that he was guilty of bigamy or murder. He may be cross-examined about the offense for which he was being tried, but no witness is ever required, under the Constitution, to answer a question that will incriminate him for another offense. One who takes the stand in his own defense should not be required to give evidence which would tend to convict him of a crime other than the one for which he is being tried because, by taking the stand, he does not waive that right: he only waives the right to remain silent as to the crime for which he is being charged.

Even if it be conceded that, in the interest of good order and proper conduct, it was petitioner's duty to report to his local board so that orderly transportation to the induction station could be given him, as provided by the Regulations, nevertheless, in view of the seriousness of the criminal penalties attached to violations of the Act, the courts will not close their eyes to the conceded fact that petitioner did report at the induction station and there join with the group that was sent from the local board. Thus, in no way was the Selective process impeded or hindered. Petitioner's failure to report at the local board did not jeopardize the public welfare. It was only an incidental and perfunctory step designed to get him to the induction station to complete the selective process. (See Section 633.2 and 633.6 for description of the procedure at the local board.) Following the reasonable and strict construction placed upon penal statutes, petitioner submits that section 11 of the Act should not be expanded into a dragnet for small and inconsequential infractions of the Selective Service

Regulations. Thus it was that the Supreme Court, in *Bartchy v. United States*, 319 U. S. 484, 488, reversed the conviction of a registrant who had failed to follow the strict requirement of the letter of the regulations concerning advising the board of his mailing address. The court held that the requirements of the law were "satisfied when the registrant in good faith" made a reasonable attempt to comply with the spirit of the law.

It is not contended that registrants have the right to disregard or flout the reasonable requirements of the Selective Service Regulations, for to do so would be to destroy the efficiency of the System. Nevertheless the court in administering such a severe penal law will exercise restraint and caution in sentencing citizens for minor infractions that are shown to be entirely harmless errors. The spirit of the Act does not call for nor permit such a harsh construction. The circumstances of this case are such that justice requires the application of the principle of estoppel. Had petitioner's act in failing to report at the local board been of such serious culpability as to warrant the judgment that has now been imposed upon him, it would have been the reasonable and proper duty of the local board to have advised the army officer at the induction station that petitioner had already violated the Act and that the induction process should not proceed until that matter had first been settled. However, when petitioner's presence at the induction station was reported to the local board, it voiced no objection whatever to the induction process proceeding, but, instead, indicated to the army officer that the petitioner was properly at the induction station.

The very fact that the local board was willing for the inductive process to proceed and maintained silence on the irregularity of the petitioner's failure to report at the local board, constitutes a waiver of such irregularity. As stated in 67 *Corpus Juris* 291-293, "A waiver occurs when one in possession of any right, whether conferred by law or con-

tract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it." If this were not true, it would enable Selective Service boards to lay a trap for registrants. Some minor irregularity might take place in the Selective Service process and later, even though the registrant might long since have been inducted into the armed forces, the local board could resurrect this irregularity and demand prosecution of the registrant for failure to comply with the strict letter of the law.

Thus waiver has also been defined as a neglect or omission to insist upon a matter of which a party may take advantage at a time when it ought to be done so that it may operate as a trap to the other party to insist upon it afterwards. The failure to register timely objection implies consent. 67 *Corpus Juris* 293.

Any irregularity was thus specifically waived by the local board and the substance of criminal liability effectively erased. Therefore, the motion for a directed verdict should have been granted. Because of the court's failure to grant the motion for directed verdict, the judgment should be reversed and the indictment ordered dismissed.

TWO

The trial court erred in overruling motion for dismissal and for directed verdict because the conceded fact that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report to the local board for induction constituted a valid defense to the indictment charging him with criminal failure to appear at the local board.

The evidence shows that petitioner was kidnaped by three state law enforcement officials and falsely imprisoned by them at the very hour he was scheduled to report to the

local board for transportation to the induction station. Regardless of petitioner's own intentions, it was physically impossible for him to appear at the local board. He was arbitrarily taken to the induction station against his will, where, by that time, the induction proceedings were ready to begin. At no time did petitioner have opportunity to report to the local board.

Realizing the force of this element in the case, the Government seeks to show that petitioner had no intention of reporting to the local board anyway, and such emphasis has been placed on this feature of its case. These circumstances pose a fundamental problem of criminal law. Can a citizen now be convicted for merely expressing an intention to violate the law? Certainly if this rule be upheld, then the effect is that conspiracy proceedings, the federal prosecutor's favorite instrument, has been substantially simplified so as to allow convictions in cases of "one man conspiracies".

There are many circumstances that might reasonably arise which would prevent a registrant from reporting to his local board at the precise hour and minute prescribed. He might meet with an accident, he might be delayed for some unavoidable reason, or have some other equally valid excuse. If the Government's contention be upheld, these defenses are immaterial, and the one question allowed to go to the jury is whether, as a matter of fact, it is true that the petitioner failed to report as specified in the local board's order.

This unreasonable and arbitrary view of law has been definitely rejected by the courts. In the case of *United States v. Hoffman* (CCA-2) 137 F. 2d 416, 421, the defendant was late in reporting to his draft board for transportation to the induction station. He contended that circumstances at his home unavoidably caused his delay and that he desired to comply with the law. The evidence in that case showed that defendant had made certain statements indicating an

intention to disobey the order for induction. The court held, however, that he could not be convicted merely on the expression of his intent but that the overt act of refusing to be inducted should be the element of criminal guilt. "While this matter was evidential of what his intent was on induction day, guilt would not be established unless he did refuse to be inducted." The court found that Hoffman had not refused to be inducted and that such inference could not be drawn from his conduct.

In the instant case, although petitioner did refuse to take the oath of induction, he has not been indicted for his delinquency in this respect but solely because he "failed, neglected and refused to REPORT FOR INDUCTION as ordered by said local board". The court is limited to the indictment. He cannot be convicted for his failure to take the oath because he is not indicted for that offense. Neither can he be convicted for failing to report for induction, because the undisputed evidence shows that he did report. The benefit of the *Hoffman* case is derived from the court's holding that his INTENT not to report cannot be made the ground for conviction.

In *United States v. Grieme* (CCA-3) 128 F. 2d 811, 815, the same principle was recognized, the court holding that "any matter exculpatory of the defendants would be such as indicates their lack of intent to disregard the board's order, e. g., if the board failed to send the registrants' notice to appear or if the registrants did not receive the notice through no fault or neglect of their own."

The act made criminal by section 11 of the Selective Training and Service Act is that of 'knowingly failing or neglecting to perform a statutory duty'. (50 U. S. C. App. sec. 311) Since the case is to be judged not by the terms of the indictment but by the terms of the statute, the legal issue must be confined to a determination as to whether or not the evidence shows that petitioner did knowingly "fail or neglect to perform a statutory duty". As said in *United*

States v. Trypan (CCA-2) 136 F. 2d 900, 901, "Not every failure to perform a duty imposed by the statute or regulations is made criminal. Only a person 'who shall knowingly fail or neglect' his duty is to be punished."

The situation is not unlike that presented in *Mackey v. United States* (CCA-6) 290 F. 18, 21. There a postmaster was indicted for embezzlement for his failure to remit certain funds to the Post Office Department within a specified time. There, as here, the Government contended that his failure to remit the money in strict accordance with the statute constituted a criminal act, "regardless of the fact that such failure might have been occasioned by sudden illness, injury, larceny, destruction of funds, or other causes for which the postmaster ought not to be held criminally responsible." Of course, this contention was rejected by the court on the ground that there was no evidence tending to prove "an intentional and criminal refusal on the part of the defendant other than his failure to make remittances in accordance with the requirement of the Post Office regulations."

The injustice of sentencing a man to a long prison term for 'failing and neglecting' to perform a statutory duty, where performance was impossible due to some extraneous circumstance, is patent. This court has very carefully reviewed and defined the import of the hackneyed legal expression 'fail and neglect' as used in criminal statutes in the case of *Hackfeld & Co. v. United States*, 197 U. S. 442, 448, holding that the term usually is intended to express carelessness or lack of attention in doing a given thing. There the court was construing a statute requiring a shipmaster to cause the return of an immigrant illegally entered into the country. Said the court: "If by this requirement, it was intended to make the ship owner or master an insurer of the absolute return of the immigrant, at all hazards, except when caused by *vis major* or inevitable accident, it would seem that Congress would have

chosen terms more clearly indicative of such intention. . . . Where the statute permits of a construction which does not require the absolute insurance of the return of the immigrant but holds the ship owner to the care and diligence required by the circumstances, we do not feel inclined to adopt the construction least favorable to the accused. This statute imports a duty and, in the absence of a requirement that it shall be required at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed."

The Government has pointed to no words in section 11 of the Act that would form basis for holding that a registrant is liable at all hazards to punctually comply with every order of the local board. This being a highly penal statute, the test above announced in the *Hackfeld* case should be adhered to. Since petitioner was kidnaped and physically restrained at the very time he was scheduled to report to the local board, it would be the grossest injustice to withhold this issue from the jury and submit the case just as if petitioner had been free to report if he wished. So to do would be against the plain and imperative import of the words 'fail and neglect' implying a condition of carelessness and lack of regard for the requirements of the law. Under the conceded facts, that element is not in this case. Petitioner's failure to appear at the local board at the time specified in the order was not shown to be due to his carelessness or disregard for the law, but was the direct result of his false imprisonment and unlawful arrest. The actual and threatened exercise of legal power possessed and believed to have been possessed by the magistrate and the two constables from which petitioner had no means of resistance or relief, compelled him to submit to their custody. *Rabich v. Hutchins*, 95 U. S. 210, 213; *Gar. Scott & Co. v. Shannon*, 223 U. S. 468; *Riley v. United States*, 15 F. 2d 314. Petitioner had the choice of submitting to the unlawful arrest or resisting it and suffering the possible consequences. The

fact that a choice was made not to resist the unlawful arrest does not change the fact that it was still false imprisonment, because petitioner had violated no law.

The situation presented here is analogous to that encountered in the field of domestic relations. A court may order a man to provide regular monthly support for his wife. It is conceivable that a man may neglect to make the regular monthly installment and be brought before the court to show cause why he should not be committed for contempt. It would certainly be conceded that he would have the privilege of showing, in defense of his action, that some extraneous circumstances made it physically impossible for him to comply with the court's order, even though he may have declared that he would not pay even if able so to do. If he had been injured, imprisoned or had become penniless and for such reasons was unable to pay the regular monthly installment, this fact should be a complete defense to the charge. Likewise, in this case, such exculpatory circumstances should have been submitted to the jury.

It has been held that a registrant's good faith and lack of criminal intent in committing certain acts cannot be urged as defense under section 11 of the Act because there the word "wilfully" is not used. Since only the word "knowingly" is used, the courts have held that good faith and honest belief on the part of a defendant in committing certain acts are immaterial as a defense to an indictment charging a violation of the Act. *United States v. Madole* (CCA-2) 145 F. 2d 466, 467; *Baxley v. United States* (CCA-4) 134 F. 2d 937. In the latter case this court said, "One is criminally responsible who does an act that is prohibited by a valid criminal statute though the one who does this act may do so under a deep and sincere religious belief. But the doing of the act was not only his right but also his duty." If, therefore, *good intent* on the part of the petitioner is no *defense* to an indictment charging a violation of the Act, then a *bad intent* to violate the Act is no

offense. Such element is immaterial. It was error to let the jury consider it in determining guilt. Justice, which excludes the element of petitioner's good faith in performing certain acts, at the same time denies the Government the right to submit to the jury the element of petitioner's bad faith as bearing upon his guilt under the law.

If the defense of good intent is ruled out, by the same token and in the same measure the latter cudgel of the Government must be likewise restrained and the issue presented to the jury solely on the question as to whether or not petitioner knowingly failed or neglected to perform a statutory duty. Therefore the Government's case finds no support or refuge in the alleged circumstance that, in view of petitioner's expressed intention, he would not have reported to the local board had he been given the opportunity. How can this court or the jury say what petitioner might have done had he not been kidnaped and been physically restrained at the crucial time? In a criminal proceeding of the magnitude here involved there is no room for speculation or conjecture as to what might have occurred, because petitioner can only be sentenced for his overt acts.

The failure to grant the motion for a directed verdict upon these points raised by the evidence showing the impossibility of petitioner's appearing at the local board, constitutes reversible error of the court below. The judgment should be reversed and the indictment ordered dismissed.

THREE

The trial court erred in charging the jury that petitioner's appearance at the induction station and acceptance by the armed forces, as well as petitioner's contentions that he was falsely imprisoned, were immaterial and in refusing the requested charges which properly presented these issues to the jury.

In the discussion appearing under the foregoing two points in this argument, it has been established that the trial court erred in overruling petitioner's motion for dismissal and a directed verdict which was urged on the ground that the undisputed evidence showed that he was not guilty in that he had reported to the induction station and had there taken all steps necessary to exhaust his administrative remedies, and on the further ground that he was kidnaped and falsely imprisoned at the time he was scheduled to report to the local board. However, the court's error is not limited to its denial of this motion. Even if this court should decide that the state of the evidence was not sufficiently clear in petitioner's favor to justify the trial court's granting the motion for dismissal and directed verdict, then it should at least hold that these defenses were legitimate questions for submission to the jury, and that it was reversible error for the trial court to instruct the jury to disregard the fact that (1) petitioner had appeared at the induction station with the knowledge of his local board, (2) petitioner had been accepted on final examination by the armed forces, and (3) petitioner had been kidnaped and was falsely imprisoned at the time he was scheduled to report at the local board as directed in the induction order. This charge amounted to an instruction to the jury to find petitioner guilty. Moreover, the court erred in refusing the requested charges that presented each

of these elements to the jury for their consideration in determining whether the petitioner was or was not guilty as charged. All petitioner's legitimate defenses were kept from the jury, whose province it was to determine these vital questions of fact. This circumstance alone requires a reversal of the case for a new trial.

Conclusion

It is submitted that this case is one calling for the exercise by this court of its supervisory powers under the Judicial Code and the Rules of this court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed, and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 5329

LOUIS DABNEY SMITH,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for
the Eastern District of South Carolina, at Columbia.

(Argued March 12, 1945. Decided April 4, 1945)

Before PARKER, SOPER and DOBIE, Circuit Judges.

Hayden C. Covington (Curran E. Cooley and Grover C. Powell on brief) for Appellant, and Louis M. Shimel, Assistant U. S. Attorney; Irving S. Shapiro, Attorney, Department of Justice, and Henry H. Edens, Assistant U. S. Attorney, (C. N. Sapp, U. S. Attorney, and Nathan T. Eliff, Special Assistant to the Attorney General, on brief) for Appellee.

PARKER, Circuit Judge:

This is an appeal from a conviction and sentence under an indictment charging violation of the Selective Training and Service Act of 1940, 50 USCA Appendix sec. 301 et seq., in failing to report for induction pursuant to the order of a local draft board. Defendant is a member of the sect known as Jehovah's Witnesses and claims exemption from the provisions of the Act on the ground that he is a minister of religion. This claim was denied by the local board and he was classified 1-A and ordered to report for induction. The appeal presents two questions: (1) whether the trial court erred in refusing to direct a verdict for defendant on the facts relating to the refusal to report, and (2) whether the court erred in excluding evidence as to the ministerial status of defendant. Both questions, we think, must be answered in the negative.

The facts with respect to defendant's failure to report are as follows: Defendant was ordered by the draft board to report to the board at its office in Columbia, S. C., for induction at 8:30 A.M., September 30, 1943. He made up his mind not to report and so notified his father, who was anxious that he report and be inducted. His father arranged with a state magistrate and two local officers to take defendant by force and carry him to the induction center at the time fixed for induction. On the morning of September 30th, defendant, who lived two miles from the office of the board where he was required to report, was making no effort to report but, between 8 and 8:30 in the morning, was at his home engaged in shaving, and intending thereafter, not to report to the draft board, but to a United States Commissioner and explain why he had not complied with the board's order. While he was so engaged, the magistrate and officers who had been employed by his father arrived at his home and by a show of force compelled him to go with them to the induction center at Fort Jackson

near Columbia, S. C., where they turned him over to the officers of the army charged with the duty of inducting draftees. Defendant notified these officers that he was a minister of the Gospel and that he refused to be inducted into the army. He was finger printed and examined by them, but refused to take an oath or go through the induction ceremony, protesting throughout the proceedings that he would not be inducted.

At the conclusion of the induction ceremony in which other draftees participated, defendant was notified that he was in the army, notwithstanding his refusal to be inducted. He was granted a three weeks leave along with the other draftees and was ordered to return to Fort Jackson three weeks later. He returned in accordance with this order but refused to put on the army uniform or obey orders. He was tried by a court martial for disobedience of orders and sentenced to a term of imprisonment but, after the decision in *Billings v. Truesdell*, 321 U. S. 542, was released on habeas corpus. He was then indicted in the court below for failure to report for induction as ordered by the draft board.

Upon the facts as stated, there was no error in refusing to direct a verdict of not guilty; for defendant was guilty, on his own admissions, of failing to report for induction as ordered by the board. Not only does he admit that he did not intend to report and remained at home when he would necessarily have been on his way to the board's office if he had intended to comply with its order, but also that, after he had been forcibly carried to the place of induction, he persistently maintained an attitude of defiance and repeatedly stated that he would not be inducted. To report for induction means to present oneself not only at the appointed place but also in readiness "to go through the process which constitutes induction into the army." *United States v. Collura*, 2 Cir. 139 F. 2d 345, approved in *Billings v. Truesdell*, 321 U. S. 542 at 557. Certainly one who has

made up his mind not to report for induction and who, after having been dragged by force to the induction center, persistently refuses to go through the process of induction, cannot be said to have reported for induction as ordered by the board, within any possible meaning that can be given to that language.

Defendant makes two arguments which are in large measure inconsistent with each other. One is that the forcible seizure made it impossible for him to report to the board and thus excuses the failure to report; the other, that he was actually present at the induction center and thus substantially complied with the order of the board. A forcible seizure which made it impossible to comply with the board's order would doubtless be a defense; but nothing of the sort is involved here. The seizure made it, not impossible, but possible, for defendant to comply; and, with the opportunity for compliance at hand, he failed to avail himself of it. Likewise, presence at the induction center, rather than at the board's office, would doubtless be sufficient compliance on the part of one who was attempting to comply with the order to report for induction, but not on the part of one who had been carried there against his will and who, being there, persistently refused to be inducted. One ordered to report for induction who presents himself at the place designated with the statement that he does not intend to be inducted at all, can hardly be said to have reported for induction. A fortiori, one who is present at the place of induction only because he is carried there by force, and who defiantly refuses induction throughout the period of his presence, cannot be said, in any reasonable sense, to have reported for such purpose. This should be so obvious as not to require statement.

Directly in point is the decision of the Second Circuit in the case of *United States v. Collura*, *supra*, cited with approval by the Supreme Court in *Billings v. Truesdell*, *supra*. In that case, where the charge was failure to report

for induction, the draftee appeared at the induction station at the appointed hour but stated that he refused to be inducted unless given a guarantee against compulsory vaccination. In affirming a conviction the court said, 138 F. 2d at 345:

"Obviously the duty to report for induction means more than putting in an appearance at the induction station. The selectee must not only appear but must be ready to go through the process which constitutes induction into the army. Admittedly the appellant did not report for induction; but reported for the purpose of making a bargain with the military authorities and entering the army only if the terms agreed upon were satisfactory to his personal views as to vaccination."

In the case at bar the draftee did not report for the purpose of making a bargain with the military authorities as a condition of induction. He did not report at all. He was forcibly taken to the induction station and, being there, refused unconditionally to be inducted. See also *United States v. Longo*, 3 Cir. 140 F. 2d 848.

On the second question, we think it clear that the trial court was correct in excluding evidence as to the alleged ministerial status of defendant and refusing to charge the jury with regard thereto. Whether the defendant was entitled to exemption from military service or not on the ground that he was a minister of religion, this was a question of fact committed to the determination of the draft board, with appeal to the appeal board and in a limited number of cases to the President, but with no provision for review by the courts. *United States v. Grieme*, 3 Cir. 128 F. 2d 811, 814-815. It was his duty to comply with the board's orders; and, in a prosecution for failure to do so, no defense based on the invalidity of the orders can be entertained. *Falbo v. United States*, 320 U. S. 549. Compliance with the board's orders includes submitting to induction, which is the last step in the process leading to induction;

for "the order of the local board to report for induction includes a command to submit to induction." *Billings v. Truesdell*, 321 U. S. 542, 557. As said by the Supreme Court in the case last cited:

"But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board. It must be remembered that sec. 11 imposes on a selectee a criminal penalty for any failure 'to perform any duty required of him under or in the execution of the Act or the rules or regulations made pursuant thereto.' He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States v. Collura*, *supra*. The order of the local board to report for induction includes a command to submit to induction. Though that command was formerly implied, it is now express. The Selective Service Regulations state that it is the 'duty of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished;' and 'to submit to induction.' (Italics supplied.)

Defendant argues that he has exhausted the administrative process, as required by the *Falbo* case, when he has submitted to physical examination and been accepted by the military authorities, and that it is then open to him, if charged with refusal to obey the board's order with respect to the final matter of submitting to induction, to attack the validity of the order by showing that the board had classified him unreasonably. The trouble with this position is that the administrative process is not exhausted until the order of the board is complied with, which, as we have seen, embraces submitting to induction. When the *Billings* case is considered in connection with the *Falbo*

case, there can be no question as to the correctness of this conclusion. In the *Billings* case, the court, after using the language which we have quoted above, goes on to say:

"Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts: . . . These considerations together indicate to us that a selectee becomes 'actually inducted' within the meaning of sec. 11 of the Act when in obedience to the order of his board and after the Army has found him acceptable for service he undergoes whatever ceremony or requirements of admission the War Department has prescribed."

Following the procedure prescribed thus embraces undergoing induction; and not until this has been done may the legality of classification be challenged. *United States v. Rinko*, 7 Cir. 147 F. 2d 1; *United States v. Flakowicz*, 55 F. Supp. 329, Aff. 2 Cir. 146 F. 2d 874. The inductee may, of course, apply for habeas corpus as soon as his induction into the army is completed, and need not wait until he is court-martialed for disobedience of military orders.

This court was of opinion when the cases first arising under the Act came before us that the invalidity of an order of classification arising from the denial of due process might be asserted as a defense to a prosecution for failure to obey the order. See *Baxley v. United States*, 134 F. 2d 998, 999; *Goff v. United States*, 135 F. 2d 610. A different view, however, had been taken by the Circuit Court of Appeals of the Third Circuit in *United States v. Grieme*, 128 F. 2d 813, 815, where that court said:

"We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the

board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts."

In the *Goff case*, *supra*, we expressly referred to the *Grieme case*, and, in justification of not following it, said: "It would seem . . . that the total invalidity of an order which would be necessary to justify release on habeas corpus would constitute a defense to a criminal action based on disobedience of that order." The Supreme Court, however, in the *Falbo case*, after referring to the conflict of view between the *Goff* and *Grieme cases*, adopted the view of the latter; and in his concurring opinion in *Hirabayashi v. United States*, 320 U. S. 81, 108, 109, Mr. Justice Douglas referred to the rule of the *Grieme case* as settled law, saying: "There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act *and to refuse or fail to be inducted*. He must submit to the law. But that line of authority holds that after induction he may obtain through habeas corpus a hearing on the legality of his classification by the draft board." (Italics supplied.) If habeas corpus is the remedy by which the validity of classification is to be tested, then, unquestionably, submission to induction is a necessary part of the preliminary process; for not until the inductee is actually in the army is he deprived of his liberty so that habeas corpus will lie.

In the *Goff case* we were impressed with the thought that the validity of an order might be challenged wherever failure to comply with it was alleged. The Supreme Court has taken the view, however, that considering the dangers which might flow from delay in time of war, a reasonable interpretation of the Selective Service Act requires that orders of the draft board be complied with and all admin-

istrative remedies thereunder be exhausted before they may be challenged in the courts. This is in accord with the holding that the validity of OPA regulations may be challenged only after administrative procedures have been exhausted, and then only in a particular court. Cf. *Yakus v. United States*, 321 U. S. 414, 427-430. Among the advantages in cases such as this of limiting the remedy of the draftee to habeas corpus proceedings commenced after the administrative process has been completed, is that unnecessary delays in the raising of the army are avoided and questions which are primarily constitutional in character are heard before a judge without the distractions and uncertainties likely to accompany a criminal jury trial. Constitutional rights of citizens must, of course, be preserved in war as well as in peace; but the procedure outlined in the *Falbo* and *Billings* cases enables the courts to preserve them without unduly interfering with the war effort.

An additional reason for sustaining the action of the trial court is that there was nothing tendered by defendant sufficient to show such a denial of due process as would result in invalidity of the draft board's order. It was certainly for the board to say whether a college student eighteen years of age, majoring in engineering, and claiming to be a minister of religion merely because he distributed Bible literature and conducted Bible studies, was a minister of religion within the meaning of the Selective Service Act. See 53 F. Supp. 583-584. The decision of the board was affirmed by the appeal board and by the President; and there was nothing offered to show that in any of the proceedings defendant was denied any constitutional right. Even if the rule of the *Goff* case be applied, therefore, there was no error; for it must be remembered that, with respect to the right to assert the invalidity of the board's order as a defense, we said in that case: "This does not mean that the court in a criminal proceeding may review the action of the board. That action is to be taken as final, notwithstanding

ing errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right."

There was no error and the judgment appealed from will be affirmed.

Affirmed.

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FILED

OCT 26 1945

**CHARLES ELMORE DROPLEY
CLERK**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 66

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

HAYDEN C. COVINGTON

GROVER C. POWELL

CURRAN E. COOLEY

Counsel for Petitioner

No. 292

WILLIAM MURRAY ESTEP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

**ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

HAYDEN C. COVINGTON

Counsel for Petitioner

JOINT BRIEF FOR PETITIONERS

"The new despotism"

"Administrative 'law' in this country is not really a system at all, but is simply an exercise of arbitrary power in relation to certain matters which are specified or indicated by statute, not on any definite principle, but haphazard, on the theory, presumably, that such matters are better kept outside the control of the Courts, and left to the uncontrolled discretion of the Executive and its servants.

"... The victim is, in such a case, perfectly helpless, and entirely without remedy. He is completely at the mercy of a person who, for all he knows, may be a bureaucratic tyrant. If he did attempt to challenge the decision by proceedings in a Court of Law, he might well be told by the Court that it must be presumed that the Minister acted in good faith, and in such circumstances the presumption is irrebuttable.

"... It is inconceivable that such legislation would be passed, at all events without protest, if the legislators knew that they were sapping the foundations of the Constitution. . . . Arbitrary power is certain in the long run to become despotism, and there is danger, if the so-called method of administrative 'law', which is essentially lawlessness, is greatly extended, of the loss of those hardly won liberties which it has taken centuries to establish."—Hewart, Lord Chief Justice of England, *The New Despotism*, Ernest Benn, Ltd., London, 1929, pp. 46, 49-50, 52.

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SUMMARY OF JOINT ARGUMENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 66

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Jurisdiction

This court has jurisdiction of this case pursuant to Section 240, (a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered April 4, 1945. (68) This court granted petition for writ of certiorari May 28, 1945. (67)*

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. (56-67) It is reported at 148 F. 2d 288.

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 601.5, 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2,

* Figures appearing in parentheses in this brief refer to pages of the printed transcript of the record.

623.21, 623.61, 625.1, 625.2, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 of the Selective Service Regulations* (32 C. F. R. Supp. 601.5 *et. seq.*) promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of Bills of Attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

1. Does the undisputed evidence show that the petitioner is not guilty of failing to report for induction where it appears that he was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board and he subsequently appeared at the induction station, joined the group of inductees sent from his local board, submitted to the physical examination, was accepted by the armed forces, refused to take the oath of allegiance, was fingerprinted, was granted a furlough and subsequently court-martialed for failure to perform military duty?

2. Does the conceded fact that petitioner was kidnaped and falsely imprisoned at the time he was scheduled to report at the local board for induction, constitute a valid defense to the indictment charging him with criminal failure to appear at the local board?

3. Did the appearance of petitioner at the induction station, pursuant to the order to report, and his failure to submit to induction constitute a failure to report for induction within the meaning of the Act and Regulations?

* The Regulations are amended frequently. The sections here set out are as they existed when the facts in controversy took place.

4. Did the intent on the part of petitioner not to report for induction justify the conviction in spite of the fact that he was imprisoned at the time he was required to report and later appeared at the induction station and submitted to the administrative process up to the point of refusal to submit to induction?

5. Did the trial court err in charging the jury that petitioner's false imprisonment was immaterial if he intended not to report, and if after the restraint was removed he refused to comply with the order to report, and in declining to give petitioner's requested instruction presenting the issue of whether he reported for induction by appearing at the induction station and following through with the procedure to the point of refusing to be inducted?

6. Does acceptance by the armed forces at the induction station complete the administrative process so as to permit judicial review of the illegal classification in defense to the indictment based on petitioner's failure to report at the local board as specified in the induction order?

7. Did the trial court err in refusing to allow petitioner the right to show, and in refusing to permit the jury to consider, the order on which the indictment was based as void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

8. Did the trial court err in charging the jury that it could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided by the jury to whether or not petitioner knowingly failed to report at the local board as specified in the induction order?

9. Did the trial court err in refusing to give petitioner requested charges, permitting the jury to consider whether or not the boards had acted in an illegal and unconstitutional manner in classifying petitioner and in ordering him to report for induction?

Statement of Smith Case

FORM OF ACTION

This criminal action was begun by indictment returned against petitioner, Louis Dabney Smith, in the United States District Court of the Eastern District of South Carolina, Columbia Division, on November 7, 1944. (2) Defendant was charged with failing to perform a duty required of him under the Selective Training and Service Act of 1940, as amended, and the Regulations promulgated thereunder, in that on September 30, 1943, he "unlawfully, knowingly and wilfully failed and neglected to . . . report for induction as ordered by the said local board." (2-3)

Petitioner urged a plea in bar, which was denied. He then urged a motion to quash (3-5) which was denied. (5) Upon a plea of "not guilty" (6) trial to a jury began on November 9, 1944, before the court. At the close of all the evidence, petitioner moved for a directed verdict of "not guilty", in which the reasons were extensively stated. (25-28) On denial thereof, petitioner duly excepted. At the close of all the evidence, petitioner submitted to the court his requested charges. (35-38) Counsel summed up the evidence and the court charged the jury. (28-40) Petitioner objected and excepted to the court's charge. (40-41) The court refused certain of petitioner's requested charges with exceptions to petitioner. (35-41) The jury returned a verdict of "guilty". (41) Thereafter, on November 10, 1944, petitioner was sentenced to three and one-half years and committed to the custody of the Attorney General for confinement in a federal institution. (1)

FACTS

Louis Dabney Smith is a minister of Jehovah's witnesses and has been for several years. (9) For four years prior to the filing of his Selective Service questionnaire, he had been a minister preaching from house to house in the same manner as did Christ Jesus and His apostles, as shown at Acts 20:20 and Luke 8:1. He had been formally ordained. The record also disclosed that he was eighteen years of age on October 4, 1942; that he registered with his local board during the week of December 18, 1942; filed his questionnaire with which he submitted proof of his ministry; that he was living with his parents, receiving support from them; and that he was a student at the University of South Carolina. (Defendant's Exhibit A for Identification). (7) (See 53 F. Supp. 582)

After considering the evidence, the local board placed him in Class I-A on April 2, 1943. He was granted a personal appearance before the board, and on May 18, 1943, the local board continued his I-A classification. On May 25, 1943, he appealed for class IV-D to the board of appeal, and on June 17, 1943, such board affirmed the classification by a vote of 4 to 1. On June 22, 1943, he appealed to the President and the classification was affirmed. On September 18, 1943, he was ordered to report for induction on September 30, 1943. (Defendant's Exhibit A for Identification). (7) (See 53 F. Supp. 582)

Petitioner's father suspected that he might be planning to refuse to report for induction on September 30, 1943 (22, 23), and about three days prior thereto he went to the local board and asked that the board have two detectives come to his home and take the petitioner to the induction station, but was informed that the local board had no police authority. (22) Thereupon, the father paid a magistrate a sum of money to arrange to forcibly take petitioner to Fort Jackson, South Carolina, on September 30, 1943; and there deliver him for induction. (23)

On the morning of September 30, 1943, between 8 and 8:30 o'clock, the magistrate and two policemen drove up in the driveway of the Smith home. Petitioner's mother saw them as they got out of the car and started toward the house. (21, 24) She ran upstairs to the bathroom where petitioner was shaving and preparing to dress, and by the time she reached there, the three men had entered the home and were behind her. (11) When petitioner came out of the bathroom he asked the men if they had a warrant for his arrest, and they told him that they needed no warrant. One of the men pulled up his coat and displayed a pistol and commanded petitioner to accompany them. (12) Thinking they were federal agents, and that he was under arrest and in their custody petitioner surrendered himself to them. (12)

The officers placed petitioner in the car and drove him to the induction station at Fort Jackson, where they turned him over to the military authorities. (12-13) Petitioner told the authorities that he was a minister of the gospel and had been wrongly classified. (13, 15) The sergeant at the desk at the induction station then telephoned Mr. Leonard, the clerk of the local board, verified petitioner's classification and informed the clerk that petitioner was then at the induction station. (13) He asked the clerk whether petitioner was supposed to be inducted into the army that day. On trial petitioner testified that the sergeant told him "that Mr. Leonard said I was supposed to be inducted into the army that day. Q. And did he say that he should send you back over to the board to be transported back to Fort Jackson? A. No, sir." (13-14)

Petitioner was then taken to another building at the fort, where he awaited the arrival of the other men from the induction center. (14) He was then put with this group of men and given a final physical examination in due course. He remained with this group until he was notified that he had passed the physical examination and was declared acceptable for the armed forces. (15) Then he was given

opportunity to choose between the army and navy. He replied that he chose neither, because he was exempt from service as a minister of religion and that he could not be inducted into the army. (15) He was then fingerprinted and questioned about his occupation, family and home. (15) He informed them that his local board was prejudiced against him, and because of such prejudice they refused to classify him as a minister. (15, 16) Petitioner was taken with a group to another building where the oath of allegiance was to be read. (16) He indicated to the officer in charge that he would not take the oath. (16) Thereupon provision of the Articles of War covering men who refused to take the oath was read to petitioner. Then he was informed that regardless of whether he took the oath or not, he was subject to the Articles of War and in the army. (16) Petitioner still refused to take the oath and submit to induction and was again informed that he was subject to the Articles of War. (17) He was further informed that he was being given a 21-day furlough, but that he was subject to the Articles of War and failing to return he would be liable for punishment because of being absent without leave, which would be desertion. (17) He was permitted to leave Fort Jackson on October 1, 1943. (17) At the end of the 21 days he returned to the Fort and asked permission to see the commanding officer at the reception center. (18) He saw the officer and told him that he was a minister of Jehovah's witnesses; that he was deprived of a IV-D classification because of prejudice on the part of the local board (18); that he was brought to the induction station against his will, and desired to be released. He was informed that he would not be released, whereupon petitioner told the officer that his obligation and mission in life was the preaching of the gospel of God's Kingdom, and that he had so consecrated his life to do the will of Almighty God. (19) Petitioner was then taken to the infirmary and then, on his refusal to wear the uniform, the officers in charge attempted to force the uniform on him. (19) For disobeying the orders

of the sergeant and other officers, he was charged with violating the Articles of War, court-martialed and sentenced to serve 25 years in prison. (19)

Thereafter petitioner filed in the district court a petition for writ of habeas corpus, alleging that the army was without jurisdiction, since he was not legally inducted into the army, not having subscribed to the formal military oath. The district court discharged the petition for the writ and remanded petitioner to custody of the military authorities. (*Smith v. Richart, Colonel*, 53 F. Supp. 582)

Petitioner duly appealed to the circuit court of appeals. Because his case was governed by *Billings v. Truesdell*, 321 U. S. 542, counsel stipulated for reversal of the judgment and pursuant thereto the circuit court of appeals ordered petitioner discharged. He was released from military custody. Soon thereafter these criminal proceedings were instituted. (19)

HOW ISSUES RAISED

Petitioner challenged the sufficiency of the indictment by motion to quash. He contended that it failed to definitely and sufficiently apprise him of the nature of the order and regulation under the Act that he was charged with violating. (3)

In that same motion defendant asserted that the administrative process had been completed so as to allow him to attack the illegality of the action of the draft boards on which the indictment was based. (3-4) He asserted that he had been examined under the Act and declared acceptable by the armed forces. Also, he claimed that he had reported for induction but had refused to submit to induction as a condition precedent to challenging the validity of the administrative action. (3) He contended that if the right to urge this defense was denied him, a construction had been placed on the Act and Regulations which made them unconstitutional. (4) Petitioner alleged that as construed

they were void because by such construction they were transformed into a Bill of Attainder, contrary to clause 3 in section 9 of Article I of the Constitution; surrendered the judicial powers to the draft board, contrary to Article III of the Constitution; denied the right to a judicial trial and the right to prove innocence and no duty under the Act, contrary to the due process clause of the Fifth Amendment to the Constitution; denied the right of a jury trial and the right to have the jury determine guilt or innocence, contrary to the Sixth Amendment to the Constitution; permitted conviction without evidence of guilt and upon hearsay evidence, and denied right to benefit of counsel before the draft boards where liability is determined under the Act, contrary to the Fifth and Sixth Amendments to the Constitution. (4) The court overruled the motion to quash. (5)

The trial court refused to review the determination of the draft boards to ascertain whether or not the defendant had been deprived of his rights under the Act. In first making its holding the court excluded the questionnaire offered by defendant. (8) He attempted to offer oral evidence *de novo* as to his ministerial training and activity as a regular minister of religion under the Act and Regulations. (9) The court excluded that offer of proof on the ground that it was an attack against the action of the draft boards according to the decisions of this court. (9) Petitioner attempted to make an extensive offer of proof by answering questions relative to his background and activity as a minister of religion. This was refused by the court. (10)

The court limited the issues to be determined by the jury, declaring that they were (a) whether petitioner was classified, (b) whether petitioner was ordered to report for induction, and (c) whether petitioner failed to report for induction pursuant to the order. The court said: "This court and this jury have nothing to do with whether he was properly classified or not."

At the close of all the evidence the court held that it

had no jurisdiction to review the action of the administrative agency, to determine whether its action was legal; and that the court and jury must accept the classification and orders of the draft boards as final. (27-28)

The court declared that whether petitioner had exhausted his administrative remedies was immaterial. Because in a criminal proceeding the court could not review the alleged illegality of the draft-board determinations and orders. (28)

When the evidence was concluded petitioner moved for a directed verdict on the grounds that the evidence was insufficient to sustain a conviction; that the Act had been construed and applied to petitioner by the court so as to make it unconstitutional; and that the evidence showed the order of the draft boards to be illegal. (25-26) In support of the motion it was argued, among other things, that petitioner's appearance at the induction station and his undergoing the administrative process, to the point of refusing to submit to induction, constituted reporting for induction, which rendered immaterial his failure to report at the local board. (26-27) The court overruled the motion, holding there was sufficient evidence to submit the case to the jury. (28)

The court charged the jury. (28-35, 38-41) The court submitted the case to the jury on the theory that the petitioner had failed to report at the local board and, with no intention to perform his duties, stayed away. (31-32) Concerning the undisputed evidence showing that petitioner was falsely imprisoned at the time he was required to report at the local board, the court said: "That would be a good defense so long as the restraint exists, but it would not relieve of the duty and responsibility of performing said duty when the restraint was removed." (32) The court told the jury that it was for them to decide whether the physical restraint had anything to do with petitioner's not reporting for induction. (32) The court emphasized that the restraint had nothing whatever to do with his induction.

by stating a hypothetical case, saying: "If it is my duty to go down in front of this Court House at a given hour, and before and at the time it is my duty to go I have no intention of doing so and would not do so, the mere fact that somebody may have laid hands on me and held me temporarily might have nothing in the world to do with my absence in front of the Court House where I was supposed to go, but if it did, if I decided that I would not go, and then changed my mind and decided I would go, then my duty called me there as soon as that restraint was removed." (32)

Moreover, the court informed the jury that the fact that a selectee might be rejected after he reported for induction "does not operate to relieve the selectee or inductee from the duty of reporting for induction." (32) This was immediately reiterated by the court to re-emphasize the petitioner's duty to report. (32-33) The court again informed the jury in the charge that the determination of the draft board must be accepted as final. "We have no authority, neither you nor I, to go behind it." (33)

The court also charged the jury that "it makes no difference what his purpose was, if he deliberately and intentionally neglected to perform a duty required of him under the law, knowing that it had been required, for that would meet the requirement of the law." (35) Exception was taken to the court's charge that the defendant could be guilty ("when he is conscious of and knows of the duty to do that which is required of him") (31) on the ground that it nullified the defense of false imprisonment at the time he was ordered to report because it "could include a person who was physically restrained and unable to comply." (40)

The hypothetical illustration given by the court in the charge was excepted to. (40-41) The court then reiterated its hypothetical illustration in these words:

"The Court: I meant to say, and think I did say, if I was required to go to the front of the building, had no intention of going there before the time or at the time,

although somebody might have put their hands upon me physically and held me, and that had nothing to do with preventing my absence, then it would not excuse me.

"Mr. Cooley: Your Honor please, the point we want to call your attention to is that the defendant himself, in order to be guilty of the failure, he must be able to perform.

"The Court: That is a matter for the defense. The Government does not have to prove that he is able to perform. He has offered no evidence that he wasn't able to perform other than that about which I have charged." (41)

The court informed the jury that "there is practically no difference as to the facts. . . . The particular issue as to the facts, it seems to the court, arises out of the interpretation that is to be placed upon facts, most of which is conceded." (38)

Petitioner duly tendered requested charges, presenting the defense of his being exempt from all training and service under the Act as a minister of religion, so as to deprive the draft boards of authority to order him to do training and service under the Act by reason of such statutory exemption. (36)

Also the court was requested to charge the jury to determine whether the draft boards arbitrarily and capriciously failed to consider proof submitted by petitioner that he was exempt as a minister of religion, and whether the draft boards had no substantial evidence or proof disputing his claim for exemption as a minister of religion. (37) These charges were refused. (36-37)

The court was requested to charge the jury that presence of the petitioner at the induction station and his undergoing the prescribed procedure there with the other selectees, after reporting, to the point of refusing to submit to induction, constituted *reporting for induction*, and that the petitioner could not be convicted of the offense of "failure to report for induction." (37) This requested charge was also refused. (37)

Specification of Errors

Petitioner Smith relies upon every one of his assignments of error as grounds for a reversal of the conviction.
(See typewritten transcript of the record.)



**[Points for JOINT ARGUMENT of *Smith* and
Estep cases appear at pages 38-40, *infra*.]**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

■
No. 292**WILLIAM MURRAY ESTEP, *Petitioner*****v.****UNITED STATES OF AMERICA, *Respondent*****ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**
■**Jurisdiction**

This court has jurisdiction of this case pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment of the circuit court of appeals was entered July 6, 1945. (68) This court granted petition for writ of certiorari October 8, 1945.

Opinions Below

The opinion of the circuit court of appeals appears in the record. (281-289) It is reported at 150 F. 2d 768. The dissenting opinions also appear in the record. (289-306) They also appear in the Federal Reporter, Vol. 150, at pages 773-781.

Statutes and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 601.5, 615.81 (a), 615.82, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 626.3, 627.12, 627.13, 629.1-629.35, 633.2, 633.21, 642.41, and 642.42 of the Selective Service Regulations * (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of Bills of Attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

(1) Does reporting at the induction station pursuant to the order and refusing to submit to induction by stepping forward after acceptance by the armed forces constitute exhaustion of the administrative process so as to qualify petitioner for a defense to the indictment?

(2) Where the undisputed evidence shows that peti-

* The Regulations are amended frequently. The sections here set out are as they existed when the facts in controversy took place.

tioner's rights to procedural due process on appeal have been denied him by the local board so as to prevent the appeal board from properly exercising its rights under the Act and regulations, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally and that the order on which the indictment was based is void?

(3) May the petitioner who is a minister of religion, exempt from all training and service by provision of the Act, show in defense to the indictment that his constitutional rights have been violated by the board's action in excess of its jurisdiction or authority and contrary to the Act and Regulations?

(4) Did the trial court err in refusing to allow petitioner the right to show, and in refusing the jury the right to consider that the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(5) Did the trial court err in holding that it and the jury could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided to whether or not petitioner knowingly failed to submit to induction, as specified in the order to report?

(6) Does the construction placed upon the Act and Regulations by the court below, requiring petitioner to report and submit to induction, and apply for a writ of habeas corpus as a condition precedent to judicial review of the illegality and unconstitutionality of the action by the board, violate Clause 3, Section 9 of Article I, and Article

III, of the United States Constitution and the Fifth and Sixth Amendments thereto?

(7) Did the trial court err in denying petitioner's motion to quash the indictment, motion for an instructed verdict and for a judgment of acquittal, in excluding proffered evidence, and in denying requests for charges, all of which pertained to the illegality of the administrative order?

(8) Did the courts below err in holding that the only method of attack against an illegal and unconstitutional action of the draft boards was by application for writ of habeas corpus?

Statement of Estep Case

FORM OF ACTION

This criminal action was instituted in the court below by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. (1)

The indictment charged that petitioner, a registrant classified for training and service in the armed forces, "did unlawfully, wilfully and knowingly fail and refuse to submit to induction; he, the said defendant, having no valid reason for having failed and refused to perform the duty as aforesaid, in violation of the directions given the said defendant under rules and regulations made pursuant to the Selective Training and Service Act of 1940, as amended." (1)

Thereafter petitioner pleaded "not guilty". (277) Petitioner filed a motion to quash the indictment on the grounds that the construction placed upon the criminal sanctions clause so as to deny him his right to show, in defense to the indictment, that the orders of the draft boards were void and illegal, violated the Constitution of the United States. (2-4, 277) The motion to quash was overruled, after argument to the court, on December 6, 1944. (4, 277) The trial to a jury before the court began on De-

cember 7, 1944. (5, 277) The court excluded and received evidence upon the trial. The case closed when all the evidence was in on December 7, 1944. (113, 278) At the close of the evidence, the petitioner moved for dismissal of the indictment and for a judgment of acquittal (113-116), and for a directed verdict of not guilty. (116-120) In these motions the reasons were stated extensively. (113-120) The motions were denied and exceptions allowed to petitioner. (120-121) Petitioner duly submitted to court, before argument of counsel to the jury, his requested instructions to the jury. (121, 123-145)

On December 8, 1944, the cause was argued to the jury by counsel. (146, 278) Thereupon the court charged the jury. (146-148) The court refused all of petitioner's requested charges to the jury and allowed exceptions to his ruling. (148-149) Petitioner duly objected and excepted to the court's charge. (149-154) The jury retired to consider the verdict at 11:06 am. (154) At 4 pm the jury sent a message to the court that the jurors were hopelessly deadlocked and could not reach a verdict. (154) Thereupon the petitioner waived his constitutional right to a unanimous verdict and agreed to have the issue of his guilt decided by a majority verdict. Counsel for the parties so stipulated which was approved by the court. (154-155) The jury thereupon rendered its verdict of guilty on December 8, 1944. (155-156) Eleven jurors were for conviction, one for acquittal. (156) On December 20, 1944 the United States District Judge rendered judgment upon the verdict of the jury and sentenced petitioner, committing him to the custody of the Attorney General for a period of five years. (160, 249, 278)

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. (250-253, 278) He timely filed his assignments of error which support each ground of this petition. (253-276) In due course the case was argued and submitted to the United States Circuit Court of Appeals for the Third Circuit. It was reargued

before six judges of the court sitting *en banc* May 31, 1945. The judgment of conviction was affirmed by that court on July 6, 1945. (289, 307)

FACTS *

The petitioner, now 22 years of age, registered under the Selective Training and Service Act of 1940, on June 30, 1942, with Local Board No. 4 of Washington County, Pennsylvania. (6, 97, 243) He was thereupon assigned order number 11918 by said board. (243) Petitioner timely filed a Selective Service Questionnaire on August 22, 1942, answering the questions required of him. (6, 161-165) In Series VII he stated he was a minister of religion, did customarily serve as a minister and had been a minister of the Watchtower Bible and Tract Society and Jehovah's witnesses since 1936. (163) He stated that he was ordained as a full-time pioneer minister on October 1, 1941. (163) In said questionnaire he claimed classification of IV-D exempting him as a minister of religion under Section 5 (d) of the Act. (164)

Also filed by Estep was a Special Form for Conscientious Objector properly filled out, which contained additional evidence as to his training for the ministry and his activity as a minister. (194-199) Estep showed that he had attended the Third Ward School at Canonsburg, Pennsylvania, from 1928 to 1935, when he was expelled from said school because of his failure to salute the American flag, contrary to his conscientious convictions. (75, 196) Thereupon he enrolled in the Gates Kingdom School operated by Jehovah's witnesses and located at Gates, Pennsylvania. (196-197) In this school he pursued the regular subjects, generally taught in the public schools, until 1940 when he graduated after successfully completing all courses, including the 12th grade. (77-78) Moreover, he additionally attended the special course of study prescribed by such school

* A more abbreviated statement of the facts appears in the opinion, record pages 290-294.

for the training of young men who desired to prepare for the ministry. He pursued this course from 1935 to 1940. (78) He filed with the local board his own written statement giving details as to his ministerial work, also a sworn certificate of ordination issued by the Watchtower Bible and Tract Society, certifying that he was a full-time pioneer minister and had been acting as such since October 1, 1941. (190-191, 192, 213)

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that the petitioner did not devote substantially all of his time to the performance of his missionary evangelistic work. There was no evidence that he did not fit, as a minister of religion, Opinion No. 14 of National Headquarters of Selective Service concerning ministerial status of Jehovah's witnesses; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. The Report of Physical Examination and Induction (D.S.S. Form 221), Defendant's Exhibit 8, under Occupation and Industry, shows that he is a "minister—Perform Missionary and Evangelical services in organizing churches". (160-245)

The local board denied his claim for exemption on October 3, 1942, and placed him in Class I-A, making him liable for training and service in the armed forces. (6, 164) Petitioner filed additional evidence and duly and timely requested a personal appearance, which was granted for October 21, 1942. (98, 99, 193) After such personal appearance the local board continued him in Class I-A. (99, 212) On October 23, 1942, Estep appealed to the board of appeal, asking for classification as a minister exempt from all training and service. (7, 9, 99, 213)

Estep's appeal was taken October 27, 1942. (9) The file was not forwarded from the local board until July 28, 1944. (9) He went to the local board on or about October 27, 1942, and offered to file his written statement of appeal and three affidavits supporting same. (24-25, 99-100, 169-172, 175-181) The local board clerk *falsely* informed him that his file had been forwarded to the board of appeal, when at the time he made the statement he knew that petitioner's file was in the possession of the local board and had not been sent to the board of appeal. (5-17)

The clerk admitted that he lied to defendant for the purpose of depriving him of his right to have his case reopened and to submit the additional evidence to be filed in his Cover Sheet and withholding the same from the Board of Appeal. (15-16)

Sometime after December, 1942, through some irregularity or mistake Estep's Cover Sheet was misplaced or lost by the local board. It was not found until February 1944. (9,14) Petitioner during this time, relying on the statement of the local board clerk, believed that his file was with the board of appeal. After his file was lost the regulations were amended so as to prevent the file from being forwarded to the board of appeal until the registrant had taken a pre-induction physical examination to determine his physical condition. If his physical examination revealed that he was not fit for service his classification would be changed. (Reg. 627.14) On April 19, 1944, he was ordered to report for preinduction physical examination on April 28, 1944. (101, 220) He complied with such order and was accepted for military training and service and assigned to the Naval Forces. (101, 221) He then learned for the first time since November 1942 that his file was not with and had never been sent to the board of appeal. He then examined his file and found part of the evidence missing. He then obtained eight additional affidavits showing that he had continued his full-time ministry and stood in relation to Jehovah's witnesses the same as do the orthodox clergy of the

recognized religious denominations to their congregations. (101-103) He also obtained copies of the missing documents, placed them with the affidavits the board had refused to accept and place in his Cover Sheet in 1942, and some additional affidavits he obtained in 1944 and, on May 23, 1944 by registered mail, he sent all this proof to the local board, together with a covering letter requesting that they be placed in his Cover Sheet for reconsideration by the local board and forwarded along with his file to the board of appeal. (101-103) At that time his file was still with the local board, and was not forwarded to the board of appeal until July 28, 1944. (9, 222) However, the local board declined to reopen his case and did not place the additional evidence received from the petitioner by registered mail on or about May 23, 1944, in his Cover Sheet, and did not forward the same to the board of appeal. (11, 15-16) Although these documents were in the possession of the local board, they were never seen by the board of appeal, the State Headquarters or the National Headquarters of Selective Service System. (11-12)

The local board prepared and filed its written arguments against the case of petitioner with the board of appeal contrary to the Regulations. (29, 29-30, 58-59, 223) This letter from the local board was considered by the board of appeal, and the classification of I-A was given largely because of the misleading and prejudicial statements made by the local board to the board of appeal. (63) On August 28, 1944, the board of appeal, not considering the evidence rejected by the Local Board, classified petitioner in Class I-A making him liable for training and service in the armed forces. (7, 103, 165)

It was offered to be proved by the chairman of the local board that the local board withheld from the consideration of the board of appeal this additional evidence. (57-58) It was offered to be shown by the chairman of the board of appeal that if the local board had included this evidence in the file it would have been considered by the board of appeal

with a different result in the classification of petitioner. (63) Both offers were rejected by the trial court.

The Pennsylvania State Headquarters of Selective Service requested additional information as to Estep's ministerial activity, even after the board of appeal had affirmed the action of the local board. The local board, in compliance with this request, took a short statement from petitioner and refused to send up the voluminous amount of evidence which it had previously refused and withheld from the board of appeal. (226-227) See comment of the State Headquarters as to the illegality of the action of the local board in this connection. (228) Moreover, it should be observed that the local board placed additional information in Estep's file after his 1942 appeal had been taken, which information was the prejudicial, anonymous letter with newspaper clipping attached. (218-219) Those two papers were placed in the file after the board had turned down Estep's request made in October 1942 to add his additional evidence.

Estep communicated with the Pennsylvania and National Headquarters of Selective Service requesting review of his file and an appeal to the President of the United States in his behalf. (103, 229-231) This was declined. (232-233) Petitioner received a notice to report for induction on September 11, 1944. (8, 165-166) He reported for induction on such date as directed. (8, 31, 103) He was sent by the local board to the induction station at the Old Post Office Building in Pittsburgh. (103-104) He arrived there on September 11, 1944 at 9 am. He was questioned as to his occupation and background. (104) He informed the woman clerk, who recorded his replies, that he was a full-time ordained minister of the gospel and missionary evangelist, preaching from house to house as did Christ Jesus and the apostles, that he would obey all the laws of the land consistent with God's law. (104-105) He was then questioned by doctors who gave him a physical examination, upon completion of which he was again declared physically and

mentally fit for training and service and his acceptance of April 1944 confirmed. (105-106) One of the doctors attempted to persuade him to submit to induction and obtain a commission as a chaplain in the Navy. (105-106) He informed the doctor that Jehovah's witnesses were ambassadors of God's Theocratic Government, requiring them to be strictly neutral. He said he was a soldier in the army of Christ, wearing the uniform of Christ Jesus and using the weapons Christ Jesus had prescribed, namely, the 'sword of the spirit, which is the word of God' (105-106), and that it was impossible for him to serve in two armies at the same time. (105) He was then requested by an officer to state what branch of the Navy he cared to go into. He declined to make a choice, explaining again that he was an ordained minister, exempt from all training and service and not required to choose. (105) He informed the officer that his entire time and energy was devoted to the proclamation of the Theocratic Kingdom in order that all people of goodwill might learn of God's provision for them to gain everlasting life on earth. (106) He was then directed to leave the induction station and return the next day. (106-107) He left at 2:30 pm, September 11, and the next morning returned to the place at the time instructed. (106-107) He refused to sign an oath that obligated him to submit to the command of the Commander-in-Chief of the armed forces of the United States, explaining that he was an ordained minister not subject to training and service in the armed forces and that the draft boards had violated the law, rather than he, that the draft board had required him to do an act which would cause him to break his covenant with Almighty God, resulting in his everlasting destruction. Estep said he told the officer that since no representative of the United States government could grant him a pardon from the punishment of everlasting death prescribed by Almighty God for him if he should break his covenant, likewise no representative of the government had authority to force him to perform an act which would result in break-

ing his covenant and everlasting death. (107-108) The officer told him that the easiest way out of the difficulty would be to go ahead and be inducted. Petitioner replied that he was not looking for the easiest way out because he was a footstep follower of Christ Jesus who admonished that all His true followers would be hated of all nations, persecuted, mistreated, imprisoned and many even killed for maintaining their integrity and thus be required to face the toughest way. (107-108) Thereupon the officer referred petitioner to Lt. Commander Elmer B. Keckler of the United States Navy, commanding officer of the Navy Recruiting and Induction station at Pittsburgh. (32-33, 107-108) He was taken before Commander Keckler who, in the presence of Chief Electrician Mate E. L. Tissue, asked petitioner what it was all about. Keckler asked Estep to sign a statement and Estep told him that he had submitted to Keckler a letter of explanation which was complete and a written record of his purpose in appearing. Keckler received the letter. (32-38, 108-109) After Estep explained why he could not submit to induction, Keckler again requested him to sign a statement and Estep again refused. (32-35, 109) Keckler sent Tissue out of the office to look for several witnesses to the refusal of petitioner to submit to induction and to refuse to sign the statement. While Tissue was gone, petitioner explained fully to Keckler the work of Jehovah's witnesses and that he was doing a work of great national importance, that he was telling the people of the Kingdom of Christ Jesus, a Theocratic Government that would be ruled by Jehovah God through his Son Christ Jesus, who would have visible representatives on the earth as princes, namely, the faithful men of old recorded in Hebrews chapter 11, who would be resurrected and brought back to earth, that all the present governments of the earth under the bondage of the greatest dictator of all times, Satan the devil, would be destroyed at the battle of Armageddon at the hands of Christ Jesus. Estep informed him that before this battle began it was necessary that the

people be warned and that he was engaged in that warning work by carrying the Gospel message of the Kingdom as a missionary evangelist to the people at their homes. (110-112) Tissué returned with the witnesses who signed the statement that petitioner refused to submit to induction after being requested to go through the induction ceremony by stepping forward and taking the oath. (110-112) The officer's statement appears in the record. (242) This the petitioner admitted he refused to do. (111)

In his letter to the commanding officer, copy of which he had filed with the local board, he stated that he was reporting because the law required him to do so; that he was an ordained minister of the Gospel, exempted from all duty but willing to obey all the laws of the United States that are in harmony with the law of God and which would not require him to give up his ministry; that the undisputed evidence showed that he was a minister of religion within the meaning of Section 5 (d) of the Act, exempt from military training and service; that the local and appeal boards violated the law in denying him the exemption; therefore the armed forces did not have authority to require him to submit to induction. (38-39, 239-240)

After his refusal to submit to induction was properly witnessed, petitioner was directed to leave the induction station. (111-112) He returned to his home and was thereafter arrested, charged and indicted for alleged violation of the Selective Training and Service Act, as aforesaid. (112)

The draft board file, including the questionnaire, showed that petitioner was a minister and conscientiously opposed to combatant and non-combatant military service, and was properly entitled to exemption and classification as an ordained minister in Class IV-D and that the boards had acted capriciously and arbitrarily in classifying him in Class I-A over his objection, and had no jurisdiction to order him to submit to induction by taking the oath. (161-165, 190, 192, 194-199, 200-230)

There is no written proof or evidence reduced to writing which shows that petitioner was not recognized, authorized or ordained by the Watchtower Bible and Tract Society and Jehovah's witnesses. (161-230) There was no evidence that he did not devote substantially all his time to the regular performance of ministerial duties in behalf of said organization. There was no evidence that he did not perform the religious ceremonies and duties. There was no evidence that the Watchtower Bible and Tract Society did not recognize petitioner as standing in relation to it as do the ministers of the orthodox religious organizations. (161-230) There was no evidence that petitioner did not follow this profession, devote his time and preach at all times shown in his papers before the board and in the manner described by him therein. There was no written evidence in the file disputing the facts stated by him in Series VIII of the questionnaire and in the other documents filed with the board in reference to his ministerial activity. There was no evidence in the file in writing which showed that petitioner falsified his claim as a minister or that he falsely impersonated a duly recognized minister of the recognized religious organization known as Jehovah's witnesses. (161-230)

HOW ISSUES WERE RAISED.

By motion to quash the indictment petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and orders based thereon. (24) He asserted that if the Act and Regulations were so construed as to deny him these defenses, they were unconstitutional because a Bill of Attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution; because they surrendered the judicial power to the draft boards contrary to Article III of the Constitution; because they denied the right to a judicial trial contrary to the due process

clause of the Fifth Amendment to the United States Constitution; because they deprived the petitioner of his right of trial by jury contrary to the Sixth Amendment to the United States Constitution. (2-4, 277) The trial court overruled the motion to quash with exception to petitioner. (4, 277)

Upon cross-examination of government witness McNutt, clerk of the local board, the petitioner attempted to prove that McNutt, acting for the local board, lied to petitioner by stating that his file was with the board of appeal, for the purpose of denying petitioner his right to present additional evidence for a reconsideration by the local board of petitioner's case and for consideration by the board of appeal, and that this was a conspiracy on the part of the local board and McNutt to deprive petitioner of his constitutional rights to have a full and fair hearing before the administrative agency. (11, 16-21) The court held that petitioner did not have the right to challenge the legality of the classification and orders because he did not comply with the order of the armed forces to submit to induction. (20) Petitioner excepted to this ruling and the remarks of the court. (21)

Upon cross-examination of government witness McNutt, petitioner attempted to show that the additional documentary evidence which he offered in May 1944 to the local board for its consideration and to be placed in his Cover Sheet for forwarding to the board of appeal was unlawfully and fraudulently withheld from the board of appeal by the clerk and members of the local board as part of a conspiracy to deprive petitioner of his procedural rights under the Act, the Regulations and the due process clause of the Fifth Amendment to the United States Constitution. (24-29) The court held that unlawful and unconstitutional acts of the draft boards were not subject to judicial review in defense to the indictment charging petitioner with refusal to submit to induction. The court declared that the only issue to be decided by the jury was whether or not peti-

tioner refused to submit to induction. (27, 29) Petitioner excepted to this holding on the ground that it abridged his constitutional rights and placed a construction upon the Act and Regulations that made them contrary to the United States Constitution, for each of the reasons specified in the motion to quash. (27, 29)

The trial court also excluded from evidence over the objection of petitioner the testimony of petitioner's witness, Thomas M. Reese, chairman of the local board. If permitted to testify Reese would have said that all the evidence reduced to writing in petitioner's file showed that petitioner was a duly recognized missionary evangelistic minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, a recognized religious organization under the Act; that petitioner devoted substantially his entire time to the performance of such preaching and had no occupation other than minister of the Gospel; that there was no evidence in the file disputing petitioner's claim as a missionary evangelist, representing the Watchtower Bible and Tract Society; that petitioner did not fictitiously claim exemption as a minister; that the local board could not point out from the file where petitioner did not fit Opinion No. 14 of the National Headquarters concerning classification of Jehovah's witnesses as ministers of religion under the Act and Regulations; that the local board wrote a letter expressing its opinion to the board of appeal, contrary to the Regulations, in violation of the procedural rights of petitioner, that in such letter the board of appeal was advised that petitioner should not be classified in IV-D because his name did not appear on the certified official list of ministers of Jehovah's witnesses filed with State Headquarters and that the statement in the letter that petitioner devoted only three days weekly to the performance of his missionary duties was not supported by written evidence in the file; that the local board unlawfully withheld from the petitioner's file documentary evidence appearing in defendant's Exhibit A and had declined to re-

open and consider anew petitioner's classification and had unlawfully withheld the documentary evidence from consideration by the board of appeal in violation of the Selective Service Regulations and the due process clause of the Fifth Amendment to the United States Constitution. (55-59, 167-189)

The trial court erroneously excluded from evidence, over the objection of petitioner, testimony of petitioner's witness, Frank A. Pireaux, chairman of the board of appeal. (61) If permitted to testify Pireaux would have said that the board of appeal considered only the evidence reduced to writing in the petitioner's file, which showed that the Watchtower Bible and Tract Society was a recognized religious organization under the Act; that petitioner was a regular minister of that Society from 1936 to 1944; that there was no evidence to dispute petitioner's claim that he was devoting substantially his full time to the performance of his work as a missionary evangelist; that the board of appeal did not find that petitioner fictitiously claimed to be a minister of the Watchtower Bible and Tract Society; that the only reason the board of appeal did not classify petitioner as a minister of religion was because his name did not appear on the official certified list on file at State Headquarters of Selective Service; that the board of appeal considered the letter written by the local board to the effect that petitioner should not be classified as a minister because his name did not appear on such certified list; that they were persuaded by the false statement of the local board that petitioner devoted only three days weekly to his ministry; that the board of appeal did not consider the affidavits and documentary proof offered by the petitioner, appearing in Exhibit A, because they were not forwarded to the board of appeal by the local board; and that if the board of appeal had considered the documentary evidence appearing in Exhibit A, they would have reached a different conclusion and found that petitioner was exempt

from all training and service as a minister of religion. (61-66, 167-189)

The trial court erroneously excluded from evidence Defendant's Exhibit "A" which contained several documents proving the ministerial status and full-time evangelistic missionary work done by petitioner. Some of these documents were offered to the local board in 1942. The local board at that time illegally refused to receive them and consider them or to reopen the case, falsely stating to petitioner that the file was in the hands of the board of appeal. Additional documentary proof was prepared in 1944 added to these documents and mailed to the local board before Estep's file was forwarded to the board of appeal so the board could reopen the case, file the evidence in the Cover Sheet, and forward the same to the board of appeal. The local board illegally and unlawfully refused to place the evidence in the file and fraudulently withheld the same from the board of appeal, contrary to the Regulations and in violation of procedural rights of the petitioner guaranteed by the due process clause of the Fifth Amendment to the United States Constitution. (10-11, 24, 50-52, 167-189) This evidence was objected to by the Government and the court sustained the objection with exception to petitioner. (24, 52)

The trial court erroneously excluded from evidence Defendant's Exhibit J, an anonymous note to the local board to which was attached a newspaper clipping concerning the sentence of Nick Falbo, the writer requesting the board to take similar action against Estep. This additional information was placed in the petitioner's Cover Sheet in December 1942, by the local board after the appeal was taken, and after refusing to receive additional evidence tendered by Estep. It was offered for the purpose of showing that petitioner had been denied his procedural rights by placing prejudicial information in his file which was not evidence as to his ministerial status. (15, 48, 218-219) The court sustained the objection of the Government with exception

to petitioner. (48)

The trial court erroneously excluded from evidence, with exception to petitioner, the testimony of petitioner's witness, Charles R. Hessler, a full-time district superintendent and minister of Jehovah's witnesses and the Watchtower Bible and Tract Society connected with the organization since 1917. Hessler would have testified that he had under his supervision as presiding minister in the district of Pittsburgh, the congregations located in Allegheny and Washington counties; that he became acquainted with petitioner, William Murray Estep, in 1936; that Estep enrolled as a student in the advanced course of ministry in the divinity school conducted by Jehovah's witnesses at Pittsburgh and later in Washington county, attending three nights weekly; that he was president of a religious corporation organized to operate a school to provide education for young "witnesses" excluded from public school for failing to salute the American flag, which school also provided a regular course of study for the purpose of training and preparing young men for the ministry; that Estep regularly attended this school, pursuing the regular course and the special ministry training course from 1936 to 1940 when he graduated after successfully completing the prescribed courses of study; that he personally authorized petitioner to preach as a part-time minister in 1936 while continuing his course of study in preparation for his full-time ministry; that since 1940 he had seen Estep grow from a part-time to a full-time minister; that Estep stands in the same relation to Jehovah's witnesses as do the orthodox clergy toward its denominations; that he knows that Estep is authorized to perform burial, baptismal and other ceremonies; that Estep has regularly served in the capacity of a full-time pioneer and evangelistic minister since October 1941. (67-71) This evidence was offered for the purpose of a *de novo* consideration of the court upon the issue of exemption of the petitioner from training and service under the Act, and to establish that the administrative agency

had no authority to order the petitioner to submit to induction into the armed forces and that petitioner had been deprived of his constitutional rights contrary to the Fifth Amendment to the United States Constitution. (71-72) This evidence was excluded with exception to petitioner. (72-73)

Similar offers of proof were made in connection with the testimony of petitioner's witnesses Stewart, McKnight, Singer and Ferree. (73) These offers of proof were made for the same purpose as the offer of proof in connection with the testimony of Charles R. Hessler. (73) These offers of proof were excluded for the same reasons. (74) Exceptions were allowed to the petitioner for the exclusions. (74)

The trial court erroneously excluded from evidence the testimony of the petitioner, William Murray Estep, as to his plans to become a minister at a very early age; the instruction he received at home from his parents in preparation for the ministry; his enrolling in the Watchtower Divinity School at an early age; his regular attendance at such school with his parents; that after becoming qualified to teach and preach in 1936 he began to preach part time from house to house; that while pursuing his part-time ministry he regularly attended the Gates Kingdom School which provided instruction in the regular public school subjects from the first to the twelfth grade and also a special course for the preparation of young men for the ministry; that he attended this Kingdom School from 1936 to May 1940; that shortly following his graduation he became assistant to the presiding minister of the Washington, Pennsylvania, congregation of Jehovah's witnesses and thereafter devoted a large part of his time to preaching as a missionary evangelist; that in October 1941 he undertook his full-time pioneer evangelistic missionary work and also continued to act as assistant to the presiding minister of the Washington congregation of Jehovah's witnesses, devoting an average of more than 150 hours monthly to actual

preaching in addition to time required for daily study and preparation for carrying on his ministerial duties; that thereafter in the performance of his full-time ministerial duties, he was transferred by the legal governing body of Jehovah's witnesses, the Watchtower Bible and Tract Society, to serve in ministerial capacities in New York City, Uniontown, Pennsylvania and Akron, Ohio; that his duties consisted of calling from house to house as did Christ Jesus and his apostles, publicly preaching upon the streets by distribution of *Watchtower* and *Consolation* magazines, by calling back on interested persons and answering Bible questions, by establishing and conducting studies in the Bible and Bible helps in the homes of the people and by regularly delivering Bible sermons to congregations of Jehovah's witnesses at least once weekly. (78-97) This evidence was offered for the purpose of a *de novo* consideration of the court upon the issue of exemption of petitioner from training and service under the Act, and to establish that the administrative agency had no authority to order petitioner to submit to induction into the armed forces and that petitioner had been deprived of his constitutional rights contrary to the Fifth Amendment to the United States Constitution. (74, 97) This offer of proof was objected to by the Government. (78, 97) The court sustained the objection, excluded the evidence, with exception to petitioner. (97)

The trial court erroneously excluded from evidence Defendant's Exhibit C, petitioner's certificate of ordination with accompanying documentary evidence (12, 45, 192); Defendant's Exhibit D, a written request of petitioner for a personal appearance before the local board, together with documentary evidence (13, 46, 193); Defendant's Exhibit F, a transcript of the proceedings at the personal appearance on October 21, 1942 (13, 47, 200-211); and Defendant's Exhibit N, a letter from petitioner to the local board dated August 21, 1942 (21, 49, 224), all of which documentary evidence was duly filed with the local board and

made a part of the Cover Sheet and duly considered by the local board and board of appeal upon a determination of Estep's claim for exemption from training and service under the Act and Regulations. This evidence rejected by the court (45, 46, 47, 49) showed that petitioner was at all times a minister of religion; that there was no credible evidence or substantial evidence before the administrative agency which disputed Estep's evidence that he was a duly recognized minister of the Watchtower Bible and Tract Society and Jehovah's witnesses; that the action of the administrative agency was contrary to law, without support of substantial evidence, arbitrary and capricious, contrary to the Act and Regulations, in excess of authority and in violation of the due process clause of the Fifth Amendment to the United States Constitution. (192, 193, 200, 224)

At the close of the evidence petitioner moved for a dismissal of the indictment (113-115) and for a directed verdict (116-120) on the grounds that the undisputed evidence showed that the draft board order was void because the board acted in excess of its authority in that petitioner was a minister of religion exempt from all training and service and was not liable for training and service under the Act; that he had exhausted his administrative remedies and was in a position to challenge the action of the administrative agency and the orders on which the indictment was based; that the board had denied him his rights of procedural due process by rejecting the evidence and that the court had construed the Act and Regulations so as to require a registrant to submit to induction as a condition precedent to a judicial review, which denies the petitioner the right of a judicial trial contrary to the Constitution of the United States. (113-120) Each motion was denied with exception to petitioner. (120-121)

Petitioner duly tendered to the court requested charges to the jury. (123-145) The requested charges defined what constituted a regular or duly ordained minister of religion (123, 123-124, 124-135); stated the duties of draft boards in

considering the ministerial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. (135-136, 139-144) The court was requested to charge the jury that if they concluded and found that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses (136-138) and there was no substantial evidence that he was not such a minister as claimed (138), that they could acquit the petitioner by their verdict saying he was not guilty. (136-138) The court was requested to charge the jury that if they found that the boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations and arbitrarily or capriciously, they could render a verdict of not guilty. (135-140) These requests were each refused separately and exception allowed to each refusal. (148-149)

The court instructed the jury that the classifications made by the draft boards were final and binding upon the court and jury and could not be questioned, that the only issue to be determined was whether or not the petitioner submitted to induction, that if the evidence showed that petitioner failed to submit to induction, it would be the duty of the jury to find the petitioner guilty. (147) The court charged the jury that they could not say whether or not the petitioner was a minister of religion, that the jury must find him to be a registrant liable for training and service, that at this trial was no place or time to review the correctness of the action of the draft boards. (147, 148) The court told the jury that the court and jury had no power to review the action of the draft boards but that such action must be accepted as conclusive. (147, 148) Petitioner objected and excepted to these portions of the court's charge on the grounds that he was thereby denied the right to urge in defense to the indictment that he was exempt from training and service as a minister of religion; that the

court instructed the jury to convict him; that the instruction of the court denied him his right to a judicial trial and a trial by jury, and abridged his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution. (149-154) Moreover, the court's charge was objected to on the grounds that the holding that petitioner must submit to induction as a condition precedent to challenging the legality of the action of the administrative agency converted the Act and Regulations into a Bill of Attainder contrary to the United States Constitution. (152)

Throughout the trial, from beginning to end, the court held that the actions of the draft boards were binding upon petitioner, the court and the jury, and that petitioner could not challenge the same on any ground, or that his failure to submit to induction was not a wilful violation of the Act.

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction. (253-276)

POINTS FOR JOINT ARGUMENT *

[See note below]

ONE

The undisputed evidence shows that Smith is not guilty of failing to report for induction as charged in the indictment.

A

Smith's nonappearance before the board at the time stated in the order to report for induction was excused as a matter of law by reason of his being at the time falsely imprisoned and under duress.

B

Smith's refusal to submit to induction after reporting at the induction station did not constitute refusal "to report for induction as ordered by the said Local Board", and excused his nonappearance at the local board at the time specified in the order.

TWO

The trial court committed reversible error in charging the jury that the false imprisonment of Smith had nothing to do with his failure to report for induction, and in refusing to submit defendant's requested instruction that presented the issue of his appearance and conduct at the induction station as constituting reporting for induction.

* A disintegrated summary of the argument, showing references to pages of this brief where the respective parts of the argument appear, is part of the index at the beginning of this brief. It immediately precedes the table of cases cited.

THREE

A sensible construction of the Act and reasonable application of the Constitution require that Smith and Estep be allowed to challenge the validity of the administrative action supporting the judgments of conviction in defense to the indictments.

A

The Act should be construed so as to allow a registrant who has been declared acceptable by the armed forces and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to submit to induction and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards.

B

A reasonable interpretation of the Constitution compels a construction of the Act allowing Smith and Estep their defenses to the indictment so as to avoid the Act's abridging the Constitution.

I. *If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, Smith and Estep will be denied their right to due process, judicial trial, and right of trial by jury, contrary to Article III and the Fifth and Sixth Amendments to the Constitution.*

II. *If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, the Act will be transformed into a bill of pains and penalties contrary to Article I, Section 9, Clause 3 of the Constitution.*

FOUR

A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of their jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

FIVE

It was reversible error for each trial court to refuse the jury the right to inquire whether or not the action of the administrative agency in denying each petitioner his claim for exemption from training and service was in violation of the Act, the Regulations and the Constitution.

SIX

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely Smith's right to have the jury pass upon the issue of the validity of his defense.

SEVEN

Estep's procedural rights to due process of law were violated by his local board withholding evidence from the board of appeal, preventing it from properly determining his rights under the Act and Regulations, contrary to the Fifth Amendment to the United States Constitution.

JOINT ARGUMENT

ONE

The undisputed evidence shows that Smith is not guilty of failing to report for induction as charged in the indictment.

A

Smith's nonappearance before the board at the time stated in the order to report for induction was excused as a matter of law by reason of his being at the time falsely imprisoned and under duress.

Petitioner went to trial under the indictment on the theory that he was charged with failure to appear at the local board on September 30, 1943, at 8:30 a. m. (2-3) The Government's proof tended to show that he failed to appear at 8:30 a. m. on September 30 as ordered by the local board. (6-7) At no time did the Government offer any evidence that the petitioner failed to submit to induction at the induction station, as ground for the charge that he failed to comply with the order and thus became guilty to report for induction. (6-7, 44-45) The Government's testimony was corroborated by the documentary evidence, being the order to report for induction, that commanded petitioner to appear at his local board at 8:30 a. m. on September 30, 1943. (43) The theory upon which the case was submitted to the jury by the court in its charge was that the petitioner failed to appear at the local board. (28, 31, 32, 35, 40-41)

That the defendant was tried and convicted for his failure to appear at the local board, rather than for his refusal to comply with the orders of the military authorities, is proved by the failure of the court to mention this element of the case to the jury, and by the refusal of the court to submit the requested instruction on that phase of the case. (37)

The undisputed evidence showed that at the time petitioner was commanded to appear at the local board he was kidnapped, under duress, and was being forcibly transported to the induction center instead of to the local board. (11-12, 21, 51)

The case was not submitted to the jury on the theory that petitioner had the right to comply with the order after arriving at the induction center and thereafter declined to obey the order to submit to induction.

Although the defendant attempted to have the court hold that his failure to appear at the board was made immaterial by his subsequent appearance at the induction station (27; 49), the theory that petitioner's refusal to submit to induction at the induction station constituted failure to report for induction was not injected into the case until the Government filed its brief and argued the cause in the circuit court of appeals.

The Government changed its theory and position as to the issue of petitioner's guilt *for the first time* after the case reached the circuit court of appeals. It was not until after the Government became uneasy and fearful of the petitioner's claim that he was falsely imprisoned that it injected into the case, for the first time, its proposition that even though petitioner may not have been guilty of failing to report to the draft board at the time stated in the order he was nevertheless guilty of failure to report for induction because the evidence showed that he appeared at the induction station not for the purpose of induction and therefore did not report for induction. *Petitioner did not have an opportunity to litigate this question in the district court.*

Petitioner should not have been required to litigate this question for the first time in the circuit court of appeals.

If the circuit court of appeals believed that this was the issue to be determined, it should have remanded the case to the district court so as to enable petitioner to have his day in court and an opportunity to fight the Government before the jury on that question.

It was highly improper for the circuit court of appeals to champion this new theory of the Government and to seize upon it as the basis for finding the defendant guilty of violating the Act when even the jury in the district court had never had opportunity to pass upon the question. It cannot be argued that petitioner's contentions made in the trial court relative to his appearance at the induction station making immaterial his failure to appear at the local board at the time specified in the order justified the new contention of the Government. This was an alternative point advanced by the petitioner in the trial court. It was properly and timely urged upon the trial court, but the Government did not see fit to urge its novel position in the trial court; or else the Government was sleeping on the law in the trial court. Surely the petitioner should not be penalized and convicted upon a new theory raised for the first time in the circuit court of appeals because the Government was not sufficiently alert to advance this theory in the district court in a timely manner.

It is especially true that a defendant in a criminal case should not be convicted on a new theory raised for the first time in the circuit court of appeals, because the federal Constitution guarantees him the rights of trial by jury upon every issue affecting his guilt.

Of course the Government will argue that the facts were undisputed and only questions of law were presented. But even so, in a *criminal case* it is impossible for the court to withdraw the issue of guilt from the jury and instruct the jury to find the defendant guilty. *United States v. Stevenson*, 215 U. S. 190, 199; *Patton v. United States*, 281 U. S. 276; *Blair v. United States*, 241 F. 217; cert. denied 244 U. S. 655; *Cain v. United States*, 19 F. 2d 472.

A fortiori, it is impossible for the circuit court of appeals to convict the defendant-petitioner on a new theory advanced for the first time in the circuit court of appeals by the Government, even though the evidence is undisputed. Indeed, the trial judge found that the evidence was undis-

puted, yet he did not withdraw the issue of guilt from the jury. (38) He told the jury: "The particular issue as to the facts, it seems to the court, arises out of the interpretation that is to be placed upon facts, most of which is conceded." It was for the jury to interpret the facts and determine whether or not petitioner's refusal to submit to induction constituted, under the law, a failure to comply with the order to report for induction.

In the trial court the petitioner did not receive an adjudication by the district judge or a consideration by the jury on the issue of whether or not his failure to submit to induction constituted failure to report for induction:

The first time he received a "trial" on that issue and theory in this case was when the cause reached the circuit court of appeals.

It is axiomatic that all issues in a criminal case that are made the basis of guilt must first be submitted to the jury by the district court. Such issues cannot be reviewed *de novo*, and for the first time upon appeal, by the circuit court of appeals. *Robinson v. Belt*, 18 U. S. 41, 50. The facts on this issue were determined and found for the first time and *de novo* in the circuit court of appeals. Due order of appellate procedure forbids the retrial of facts and any new issues injected into the case in the appellate court. The only mode known to the law to re-examine new issues on facts in a criminal case where the defendant is entitled to the right of trial by jury is in the trial court. *Chicago B. & Q. Ry. v. Chicago*, 166 U. S. 226, 242-246.

The court below said that a forcible seizure which made it impossible to comply with the board's order would doubtless be a defense. (62-63) The circuit court of appeals said that the seizure made it possible for the petitioner to comply with the order, because he could have submitted to induction when ordered to do so by the armed forces at the induction station. This holding of the appellate court is based on the theory that the defendant was being tried for his refusal to report for induction by refusing to submit

to induction. When the record is examined it clearly appears that the case was tried on the theory that the defendant failed to appear at the local board. This being true, it was impossible for petitioner to comply with the order as he was commanded to appear. On the theory that the petitioner was convicted in the trial court of failing to appear at his local board, the decision of the courts below is in direct conflict with *United States v. Hoffman*, 137 F. 2d 421. Cf. *United States v. Grieme* (CCA-3) 128 F. 2d 811, 815.

Petitioner was tried and convicted in the district court on the ground that he intended not to report for induction but to report to the United States Commissioner on the morning of September 30, 1943, at 8:30 o'clock, thereby rendering immaterial his false imprisonment at the time that he was to appear at the local board as required by the order, especially in view of the fact that he did not comply with the order after the restraint was terminated. (32, 41)

Can a registrant be convicted for failure to report because of his intention not to report and without proof of an overt act?

The mere asking of the question resounds an emphatic NO.

"Not every failure to perform a duty imposed by the statute is made criminal." *United States v. Trypuc* (CCA-2) 136 F. 2d 900, 901. See *Mackey v. United States* (CCA-6) 290 F. 18, 21. Cf. *Hackfeld & Co. v. United States*, 197 U. S. 442, 448.

The situation in which the petitioner found himself is analogous to that of a man ordered by the court to provide regular support to his spouse from whom he is separated. If he were proceeded against for contempt because of failure to make monthly payments, he could no doubt show that by some fortuitous circumstance beyond his control it was humanly impossible to comply with the court's order, even though he may have intended not to pay, even if able to do so. There must be the commission of an overt act or the freedom to commit an overt act at the time of an alleged

offense such as the petitioner here was charged with and convicted of. If by reason of duress or false imprisonment a person is incapacitated from committing the crime, it is highly improper to convict him merely because of his previous declarations or his intent.

It has been held that a registrant's good intentions and belief that he was not liable under the Act do not constitute valid defenses. *United States v. Madole* (CCA-2) 145 F. 2d 466, 467; *Baxley v. United States* (CCA-4) 134 F. 2d 937. If *good intention* is not a defense, then by force of the same reasoning *bad intention* does not constitute a true and sufficient basis for guilt under the Act where there is no overt act committed or where it was humanly impossible to perform a duty regardless of the intention of the person charged.

Accordingly, the court below erred in holding that the trial court was not required to grant the petitioner's motion for a directed verdict, because the undisputed evidence showed as a matter of law that he was not guilty of failing to report at the local board on September 30, 1943, at 8:30 a. m., by reason of his being falsely imprisoned and under duress at the time.

B

Smith's refusal to submit to induction after reporting at the induction station did not constitute refusal "to report for induction as ordered by the said Local Board", and excused his nonappearance at the local board at the time specified in the order.

Section 633.2 of the Selective Service Regulations provides for the issuance of the order to report for induction.

Section 633.21 of the Regulations provides: "It shall be the duty of the registrant to report for induction at the time and place fixed in such order. . . . Regardless of the time when or the circumstances under which the registrant fails to report for induction when it is his duty to do so,

it shall thereafter be his continuous duty from day to day to report for induction to his local board."

That same regulation (Sec. 633.21) further provides that upon "reporting for induction, it shall be the duty of the registrant (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board."

In *Billings v. Truesdell* (321 U. S. 542) this court discussed the various Selective Service Regulations pertaining to the process of selection and induction. This court said:

"The Selective Service Regulations also draw a distinction between acceptance (or being found acceptable) by the Army and induction." (p. 553)

"These regulations thus suggest that induction follows acceptance and is a separate process." (p. 554)

"We mention these recent regulations because they perpetuate the distinction between acceptance or being found acceptable and induction which appeared in the regulations when *Billings* reported at the induction station." (p. 555)

"But induction under the Act and the present regulations is the end product of submission to the selective process and compliance with the orders of the local board." (p. 556)

Although the order "to report for induction includes a command to submit to induction" (*Billings v. Truesdell*, 321 U. S. 542, 557) upon "reporting for induction" (Regulations, Sec. 633.21), it does not mean that refusal to submit

to induction constitutes failure to report for induction.

A reasonable interpretation of the term "report for induction" is "to make one's presence . . . known to the proper authority by presenting oneself; as, . . . to report at Headquarters." (*Webster's New International Dictionary*, 1944 edition) All statutes should be given a reasonable construction. An interpretation which leads to absurd consequences must be avoided whenever a sensible interpretation can be given to the statute. *Hawaii v. Mankichi*, 190 U. S. 197, 212. Under this rule requiring a sensible construction, it would seem that "reporting" for induction means "appearing" before the designated authority.

There is a clear distinction between reporting for induction and submitting to induction: Regulations, Sec. 633.21 (b). Failure to *submit* to induction is not included in failure to *report* for induction. The court below relied upon *United States v. Collura* (CCA-2) 139 F. 2d 345, saying that the decision was directly in point. The *Collura* case did not say that the refusal to submit to induction constituted failure to report for induction, or that refusal to submit to induction was included in the offense of failure to report for induction. The *Collura* case is distinguishable because there *Collura* did not complete the "connected series of steps into the national service which begins with registration" and which "does not end until the registrant is accepted by the army, navy, or civilian public service camp." (*Falbo v. United States*, 320 U. S. 549, 553) *Collura* appeared at the induction station and attempted to bargain with the medical authority. He did not undergo the induction process. He was not examined at the induction station. He did nothing but report and refuse to go further. He did not have a chance to refuse to submit to induction.

Here petitioner, after appearing at the induction station, voluntarily entered into the process of selection at the induction station and obeyed all orders of representatives of the armed forces down to the point where he was requested to submit to induction. Since obedience to the

orders of the representatives of the armed forces at the induction station constituted reporting for induction, according to the opinion of the court below, petitioner had reported for induction while he was complying with the orders down to the point of his refusal to submit to induction. Both the local board and the representatives of the armed forces at the time considered the petitioner as having reported for induction. The local board's clerk was telephoned by the representative of the armed forces at the induction station. That representative informed the board's clerk of petitioner's appearance and presence at the induction station. The clerk did not protest. The military authorities did not treat petitioner as having failed to report for induction. Indeed, representatives of the armed forces assumed military jurisdiction over petitioner in spite of his refusal at that time to submit to induction by undergoing the prescribed ceremony.

Petitioner's appearance at the induction station, submitting to the selective process, complying with all orders of representatives of the armed forces down to the point of refusing to submit to induction, distinguishes this case from the decision in *United States v. Collura* (CCA-2) 139 F. 2d 345, and the decision in the case of *United States v. Longo* (CCA-3) 140 F. 2d 848. When one appears at the induction station and refuses to take any steps, but merely presents himself there for the sole purpose of informing the authorities that he will not submit to any of their orders and refuses to enter upon any of the process, it cannot be said that he has reported for induction.

But one who, as Smith, or as Billings, reports at the induction station and undergoes the process to the point that he has exhausted his administrative remedies and then refuses to submit to induction, indeed has *reported* for induction. It cannot be reasonably said that he has not *reported* for induction. In other words, if one reports for the purpose of exhausting his administrative remedies he

has reported at the induction station "as ordered by the said Local Board". (3)

The construction here contended for (that refusal to submit to induction does not constitute failure to report for induction) has been recognized by the Government in several prosecutions:

Billings, whose conduct at the induction station was identical with that of Smith, after this court discharged Billings on the petition for writ of *habeas corpus*, was indicted because he did "refuse to report to said Local Board for induction *and to submit to induction* into the land or naval forces of the United States at the time and place so designated in said order."

In *United States v. Rinko*, the defendant was indicted for failure to report for induction, for failure to obey the orders of representatives of the armed forces while at the induction station and for failure to submit to induction. (*Rinko v. United States*, No. 1071 Oct. T. 1944, cert. denied 65 S. Ct. 1086, Record pp. 2-5) On facts similar to those in this case Rinko was found not guilty of failing to report, but was found guilty of failing to obey the orders of representatives of the armed forces and of failure to submit to induction. *Ibid.* 157.

In *United States v. Estep* (CCA-3) 150 F. 2d 768 (*Estep v. United States*, No. 292 Oct. T. 1945, certiorari granted Oct. 8, 1945, Record p. 1), defendant was indicted for failure to submit to induction. On facts analogous to the facts in this case Estep was convicted of failure to submit to induction. *Ibid.* 148, 156, 160.

The court below relies upon the language of this court in *Billings v. Truesdell*, 321 U. S. 542, 557, where it is said: "He who reports to the induction station but refuses to be inducted violates sec. 11 of the Act as clearly as one who refuses to report at all. *United States v. Collura, supra*. The order of the local board to report for induction includes the command to submit to induction."

The mere fact that one who refuses to submit to induc-

tion violates the Act as clearly as one who refuses to report does not mean that he can be convicted for failure to report for induction when facts show that he was guilty of failure to submit to induction. There are many different acts of Congress that have penal provisions which may be violated in any one of several different ways, but a person indicted for violating the Act in one way specifically described in the indictment cannot be convicted for violating the Act upon proof showing that he violated it in another way.

One indicted for burglary could not be convicted of the offense of burglary if the facts showed that he was guilty only of theft. The offense of failure to submit to induction is equally as distinct from the offense of failure to report for induction as the offense of theft differs from that of burglary. It is fundamental that a defendant in a criminal case cannot be convicted of an offense different from that for which he is indicted.

The court below said that "presence at the induction center, rather than at the board's office, would doubtless be sufficient compliance on the part of one who was attempting to" submit to induction. (59) But the court below held that if one reported to exhaust his remedies and intended to refuse to submit to induction it would not be reporting for induction within the meaning of the Act. (59) In other words, the court holds that if a registrant had good intentions upon reporting and complied with all orders by submitting to induction then he can be said to have reported for induction. On the contrary, the court said that if the one had bad intentions or intended to refuse to submit to induction after reporting to exhaust his administrative remedies, he did not report for induction. Such construction placed upon the Act by the court below, that bad intention transformed the offense of failure to submit to induction into failure to report for induction, is unreasonable. Such strained construction in interpreting the Act makes a drag-net out of an indictment charging the registrant with failure

to report for induction. It permits such a registrant to be put to trial under circumstances making it impossible to know what proof he will be required to meet, or what act will be relied upon by the Government as constituting the basis for guilt.

The injustice of the construction placed upon the Act by the court below is proved by the mistreatment of the petitioner in this case. In the trial court the Government contended that it was petitioner's failure to report at the local board that made him guilty. Indeed, in the trial court, under the indictment, petitioner was found guilty of violating the Act by failing to report to the local board at the time specified in the order. He was not found by the jury guilty of violating the Act by his failure to submit to induction. But under the construction placed upon the Act and the indictment by the court below he was found guilty *for the first time* in the circuit court of appeals, under the indictment, of violating the Act by refusal to submit to induction.

Thus petitioner was convicted in violation of the orderly due process of law in the trial of criminal cases in the federal courts.

TWO

The trial court committed reversible error in charging the jury that the false imprisonment of Smith had nothing to do with his failure to report for induction, and in refusing to submit defendant's requested instruction that presented the issue of his appearance and conduct at the induction station as constituting reporting for induction.

By stating a hypothetical case to the jury in its charge to the jury the trial court informed the jury that petitioner's

false imprisonment had nothing to do with his failure to appear at the local board at the time specified in the order.

(32) Exception was duly taken to this charge. (40-41) In petitioner's requested instruction No. 10 the court was asked to charge the jury that if they found petitioner appeared at the induction station, underwent the physical examination and other prescribed procedure, obeyed all orders and participated in the induction ceremony to the point of refusing to submit to induction, they could find that he did not fail to report for induction as charged in the indictment and acquit the defendant. (37) Exception was taken to the refusal of the court to grant that requested charge. (40)

Petitioner was entitled to have the jury consider the circumstances of his being under duress and falsely imprisoned at the time he was required to report at the local board in determining whether or not he was guilty of failing to report at the local board as alleged in the indictment. The charge of the court in stating the hypothetical case, by informing the jury that if petitioner had no intention of going to the local board at the time specified in the order, his false imprisonment and the duress exercised against him would have nothing to do with his failure to comply with the order, was erroneous, prejudicial to the petitioner and is ground for reversing the judgment of conviction and remanding the case to the trial court for retrial.

Moreover, petitioner was entitled to have the jury give proper consideration to his conduct at the induction station in determining whether or not he was guilty of failure to report for induction. These elements were properly presented to the court in the requested instruction No. 10, which was refused by the court. This also was reversible error and requires that the judgment be reversed and the cause remanded to the trial court for a new trial.

THREE

A sensible construction of the Act and reasonable application of the Constitution require that Smith and Estep be allowed to challenge the validity of the administrative action supporting the judgments of conviction in defense to the indictments.

A

The Act should be construed so as to allow a registrant who has been declared acceptable by the armed forces and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to submit to induction and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards.

Section 11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. Sec. 311) provides: "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, . . . who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act."

The Burke-Wadsworth Senate bill provided for the civil

and military courts to have concurrent jurisdiction over violators of the Act. (86 Cong. Record, part 9, page 10709) Before the Act was passed Senator Bone introduced an amendment. He said:

"My amendment would substitute the United States District Court as the body to try such a young man [who violates an order to report for induction] instead of a naval or military court martial. . . ." (86 Cong. Record, p. 10985)

That provision was accepted by a conference of both houses.

The conference report reads, *inter alia*:

"The Senate Bill provided that persons subject to the Bill who fail to report for duty as ordered should be tried exclusively in the District Courts of the United States and not by military or naval court-martial, unless such persons had actually been inducted for the training and service prescribed in the Bill . . ."

Major Lewis B. Hershey testified before the Committee on Military Affairs, House of Representatives, that the military authorities should not be the policemen to enforce the Act. After he became the Director of Selective Service he made the first report of the Director to the President. (*Selective Service in Peacetime*, Government Printing Office, 1942) In that report he stated that the prosecutions had not been vested with the military authorities, but that all alleged delinquents under the Act were prosecuted by civil authorities in the district courts through the Department of Justice. He declared that the authorities of the armed forces had no jurisdiction over a delinquent. He commended this method of enforcement of the Selective Training and Service Act, stating that the nation had learned its lesson from the Civil War when draft riots resulted from automatic conscription and the exercise of jurisdiction to enforce the law by the armed forces. (*Ibid.*, pp. 293-297; see,

also, *Selective Service in Wartime*, Second Report of the Director of Selective Service 1941-1942, Government Printing Office, 1943, pp. 311-312.)

A reasonable interpretation of the statute by this court is due, indulging all reasonable doubts concerning the meaning of the Act in favor of the rights of one indicted thereunder. (*Harrison v. Vose*, 50 U. S. 372, 378) It has been said that a sensible construction should be placed on an act so as to avoid oppression, absurd consequences, or flagrant injustice. It will be presumed that Congress intended to avoid results of such character. (*United States v. Kirby*, 7 Wall. 482, 486-487; *United States v. American Trucking Ass'n*, 310 U. S. 534) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408) The argument of the Government, that a defendant charged with violation of the Act by failure to comply with the orders of the draft boards or the armed forces cannot challenge those orders in defense to an indictment and that the only remedy a person has is to apply for a writ of habeas corpus, requires the court to place an unreasonable construction upon the Act. Additionally, it raises "a succession of constitutional doubts as to such interpretation." (*Harriman v. Interstate Commerce Comm'n*, 211 U. S. 407, 422)

The Government says that the complete absence of any provision for such defense forces the conclusion that Congress did not intend to allow it. Silence of the Act about the defenses available does not preclude a challenge of the validity of an order on which an indictment is based. Murder is prohibited, yet the statute defining it is silent about the defenses of accident and self defense. (35 Stat. 1143, 18 U. S. C. Sec. 452) Crime of rape is also prohibited, although the statute defining and prohibiting it says nothing about the defense of consent. (35 Stat. 1143, 18 U. S. C. Sec. 457)

The statute prohibiting larceny defines it, yet says nothing about the defense of ownership. (35 Stat. 1144, 18 U. S. C. Sec. 466) Silence of these statutes does not prohibit the one indicted thereunder from making the defenses above mentioned. It is the duty of the court to interpret criminal statutes so as to permit the defendant to make any reasonable defense and to avoid penalties and oppression. In the case at bar the court must indulge in a fiction to say that Congress specifically intended to deny the defense of no duty under the Act. Had Congress decided to prohibit persons with no duty under the Act from making defenses to indictments under the Act charging them with failure to perform a duty, it would not have done so "by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process." *Western Union Tel. Co. v. Lenroot*, 323 U. S. 490.

Criminal sanctions of Section 11 of the Act are limited to one who refuses "to perform *any duty* required of him under or in execution of this Act". Surely if Congress exempted a person from *duty* he could show such exemption as one of his defenses under the Act when prosecuted under Section 11. Furthermore, if the administrative action or determination upon which the indictment under Section 11 of the Act is based is illegal, then reason and justice would dictate that such invalidity can and may be shown in defense to the indictment.

Wholly unreasonable is the assumption that Congress, through Section 11 of the Act, intended to confer jurisdiction upon federal district courts to try offenders, and then sap the courts of their judicial power by mere silence. The mere fact that the Act is a war measure, designed to defend the nation in time of peril, does not justify distortion of the Act so as to deny a necessary and reasonable defense.

Even in England, where the legislative and administrative bodies acting pursuant to acts of Parliament are wholly unrestrained by a written constitution, the courts have refused to construe a war measure and regulations thereunder so as to deny one the right of access to the courts to protect himself from oppressive administrative action taken under the measure. *Chester v. Bateson*, 1920, 1 K. B. 829. In that case Justice Darling said: "I allow that in stress of war we may rightly be obliged, as we should be ready, to forego much of our liberty, but I hold this elemental right of the subjects of the British crown cannot be thus easily taken from them." (p. 835)

Justice Avory, in the same case, declared: "In my opinion there is not to be found in the statute anything to authorize or justify a regulation having that result; and nothing less than express words in the statute, taking away the right of the King's subjects of access to the Courts of Justice, would authorize or justify it." (p. 836)

In the same case, Justice Sankey said: "I should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act." (p. 838)

Justice Scrutton, on considering the same statute (In re *Boaler*, 1915, 1 K. B. 21, 36) said: "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. . . . But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension."

Under the British Military Service Act of 1916 containing provisions similar to those of the Selective Training and Service Act of 1940, it was held that a regular minister who refused to report for induction as ordered by the admin-

istrative board under the Act was entitled to challenge the legality of his classification in defense to summary criminal proceedings brought against him to punish him for failure to be conscripted under the Act as ordered by the board. (*Offord v. Hiscock*, 86 L. J. K. B. 941; *Hawkes v. Moxey*, 86 L. J. K. B. 1530. Cf. *Wayne v. Thompson*, L. R. 15, Q. B. 342, 1885.)

Are the rights of the subjects of the British King, to have free access to the courts to protect their liberties, greater than the rights of citizens of the United States?

Does the fact that here is involved the emergency of 1939-1945 instead of the emergency of 1914-1918 alter the situation so as to minimize those rights?

The failure of Congress to provide for judicial review of the validity of administrative orders in other acts establishing administrative agencies has not precluded judicial review. In absence of specific provision for judicial review of the illegality of administrative action the courts have allowed review under general practice and law. These non-statutory provisions for judicial review have been available for the review of major administrative activities of the Government for which no remedy is provided in the statute. (*United States v. O'Donnell*, 303 U. S. 501, 524; *United States v. Griffin*, 303 U. S. 226, 238; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 343; *Ng Fung Ho. v. White*, 259 U. S. 276; *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. See "Administrative Procedure in Government Agencies", 77th Cong., 1st Sess., Senate Document No. 8, Government Printing Office, Washington, 1941, pages 81, 92-93.)

Even where the statutory remedy expressly provided is not adequate to protect the right, or does not include the particular situation involved, the courts have allowed judicial review in addition to the statutory methods employed. *Shields v. Utah-Idaho Central Ry.*, 305 U. S. 177; *Utah Fuel Co. v. Bituminous Coal Comm'n*, 306 U. S. 56.

That the Selective Training and Service Act of 1940 is

a war measure, effective during the emergency, does not affect the rule of reasonable construction, or the rule of construction so as to avoid unconstitutional results. The Constitution of the United States provides for protection of the right of defendants in criminal cases to make their defense at all times. Those rights cannot be taken away in prosecutions under war measures merely because it is expeditious and in the interest of public policy to do so. The constitutional restraint directing a construction of the act so as to allow petitioner a defense to the indictment "is a law for rulers and people, equal in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances". (*Ex parte Milligan*, 2 Wall. 2, 120) It would be treason to the Constitution for the judiciary to deny protection of the rights of a citizen prosecuted under a war measure because of public policy. *Cohens v. Virginia*, 6 Wheat. 264, 404.

Recently this court has said that the members of the court "fully recognize, as did the Court in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 426, that 'even the war power does not remove constitutional limitations safeguarding essential liberties.'" *Bowles v. Willingham*, 321 U. S. 503, 521. Cf. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155.

Denial of the defense to a registrant who claims exemption because he defied the order of the draft boards has no reasonable relation whatever to the raising of an army or to the defense of the country.

Denial of the defense has not discouraged delinquency under the Act. (See Third Report of the Director of Selective Service, *Selective Service as the Tide of War Turns*, Government Printing Office, Washington, 1945, p. 214.)

Denial to an exempt registrant of his defense under the Act to the indictment merely speeds the registrant into prison, making him become an adjunct of the federal penal community rather than of the nation's armed forces—the prison rather than the army being the recipient of the

registrant's presence. The national fighting force does not profit or benefit by denial of judicial process. The defense of the country does not gain anything by denying the right of due process of law to a registrant charged with violating a draft board order.

No clear and present danger to the raising of an army and navy results from allowing a defendant to show that he is not subject to any training and service under the Act because of the exemption provided by Congress.

Indeed, if exempt persons were allowed the right to protect themselves in the courts from arbitrary acts of draft boards that refuse to follow the law, greater respect for the Act would be accorded by the people who believe that the Act was passed for the purpose of preserving the instrumentalities of democracy rather than for the purpose of destroying the right of due process of law on the home front. The Government would have no difficulty whatever in convicting real draft evaders. If exempt persons were allowed their right to make their defense, honest judges and intelligent juries would have no difficulty in distinguishing an exempt person under the Act from a draft evader. The mere fact that exempt persons would have the right to make a defense to the indictment would not stimulate an increase in the number of draft evaders and delinquents. Criminally minded persons, intent upon defying the law, would not change their traits purely because exempt persons were denied their right to show their exemption in defense to an indictment based on an illegal draft-board order. Also honest ministers exempt from duty would not submit to an illegal order of a board merely because the courts have cut out reasonable defenses. Better it is for the guilty to escape, by reason of adherence to due process of law, than that one innocent person should be convicted on account of denial of due process of law, has ever been the policy in common law countries. For the same reason it should be held that one exempt under the Act should not be denied the right to show that he had no duty under the Act,

because some nonexempt person might fictitiously claim that he was exempt in defense to an indictment.

Considerations of public policy do not allow the denial of due process of law. This is specially true where no clear and present danger results to the raising of an army or navy through the granting of due process of law. The Government's argument that conscription of manpower for the armed forces under the Act would be impaired and possibly frustrated by allowance of due process of law to exempt persons under the Act is chimerical and figmentary. Such consequences cannot reasonably be conceived or foreseen when the clear-and-present-danger test is applied. Vague and speculative contingencies should not be seized upon to deny the constitutional right of one to be heard in defense to the indictment. The rule requiring establishment of clear and present danger before denial of the right of freedom of speech, of press and of worship can be sustained ought properly to be applied to the denial of the right to be heard and to a judicial trial. The mere possibility that a substantial evil will result cannot alone justify a restriction of the defenses ordinarily allowed in criminal cases. The danger must be substantial, serious, clear and present. Inconvenience to the Selective Service System of an exempt person claiming his right to due process of law, contrary to the expression of administrative preferences and beliefs, cannot transform the allowance of due process of law in a criminal case into a clear and present danger to conscription of manpower under the Act. *Schenck v. United States*, 249 U. S. 47, 52; *Bridges v. California*, 314 U. S. 252; *Schneider v. State*, 308 U. S. 147, 161.

Preserving due process of law in the trial of cases brought under Section 11 of the Act, so as to permit an exempt person to challenge validity of the draft-board orders, has about as little effect upon and presents about as little danger to the raising of the armed forces as allowance of due process and the right of a defendant in a murder case to show that he shot in self-defense would

have on the funeral proceedings of the deceased.

This portion of the argument can be well summed up by a quotation from Mr. Justice Murphy in *Falbo v. United States*, 320 U. S. 549:

"Finally, the effective prosecution of the war in no way demands that petitioner be denied a full hearing in this case. We are concerned with a speedy and effective mobilization of armed forces. But that mobilization is neither impeded nor augmented by the availability of judicial review of local board orders in criminal proceedings. In the rare case where the accused person can prove the arbitrary and illegal nature of the administrative action, the induction order should never have been issued and the armed forces are deprived of no one who should have been inducted. And where the defendant is unable to prove such a defense or where, pursuant to this Court's opinion, he is forbidden even to assert this defense, the prison rather than the Army or Navy is the recipient of his presence. Thus the military strength of this nation gains naught by the denial of judicial review in this instance. . . .

"That an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action is not in keeping with the high standards of our judicial system. Especially is this so where neither public necessity nor rule of law or statute leads inexorably to such a harsh result. The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case."

Determinations of only a very few administrative tribunals have depended upon resort to the courts for enforce-

ment. In such instances where boards and commissions are required to seek the aid of the courts in enforcing their orders it has been held that the court called upon to enforce the order has the power to pass on the validity thereof and the administrative proceedings upon which the same is based. *Village of Carthage v. Colligan*, 216 N. Y. 217; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320; *Wadley So. Ry. v. Georgia*, 137 Ga. 497, reversed 235 U. S. 651.

This question was considered by this court tangentially in *California v. Latimer*, 305 U. S. 255, 261. There the court denied the injunction prayed for to enjoin enforcement of the Railroad Retirement Act on the ground that any state employee proceeded against under the criminal sanctions clause of Section 10 (b) 4 could defend to the indictment "on the ground that the State Belt Railroad is not subject to the Railroad Retirement Acts."

In *Hagar v. Reclamation District*, 11 U. S. 701, this court said: "The assessment under consideration could, by the law of California, be enforced only by legal proceedings and in them any defense going either to its validity or amount could be pleaded."

Decisions of the lower courts have blindly assumed, without discussing these various considerations and the right to due process of law in a criminal trial, that Congress intended to deny the right to challenge the invalidity of the draft-board order in the federal courts unless and until the registrant had satisfied the order by fully complying therewith through submission to induction into the armed forces. *Smith v. United States* (CCA-4), 148 F. 2d 288; *Koch v. United States* (CCA-4) 150 F. 2d 762, decided July 11, 1945; *Rinko v. United States* (CCA-7) 147 F. 2d 1; *Estep v. United States* (CCA-3) 150 F. 2d 768, certiorari granted Oct. 8, 1945. These decisions are an illogical and an unnecessary extension of the doctrine of *Falbo v. United States*, 320 U. S. 549; *United States v. Grieme* (CCA-3) 128 F. 2d 811; *United States v. Kauten*, 133 F. 2d 703, and scores of other decisions too numerous to mention, all of which involve

instances where the registrant failed to exhaust his administrative remedies. The reason that judicial review was not permissible and denied in all those administrative-law cases is that the registrant had failed to exhaust completely his administrative remedies under the Act. *Myers v. Bethlehem Shipbuilding Corp'n*, 303 U. S. 41. All of these many decisions holding that the orders of the draft boards cannot be challenged by registrants who refuse to report for induction are not in point, and they are not precedent dispositive of questions presented in the circumstances under review here, because here the registrant completed the administrative process. See dissenting opinion of Biggs, C. J., in *United States v. Estep* (CCA-3) 150 F. 2d 768, decided July 6, 1945, No. 292 October Term 1945, *Estep v. United States*, certiorari granted Oct. 8, 1945, Transcript of the Record, pp. 299-306.

There is no Congressional material from which it may be determined precisely what Congress intended to permit about denying challenge to orders of draft boards in defense to indictments based thereon under the Act. The construction placed upon the Act by the courts was reiterated in the Report of the Committee on Military Affairs, 79th Congress, 1st Session, which is a report on the bill for mobilizing of civilian manpower, H. R. 1752. In that report it is said: "In order to obtain judicial determination of such issues, such registrants must first submit to induction and raise the issue by habeas corpus. See *Ex parte Stanziale* (CCA-3, 1943) 138 F. 2d 312, cert. den. 320 U. S. 797." This report does not express the Congressional intent in the passage of the Act in 1940. Indeed, this court found that there was no record of legislative intention on the subject. (*Falbo v. United States*, 320 U. S. 549, 554) Whatever may be said as to the intention of the Committee on Military Affairs, there seems to be real doubt as to whether Congress ever intended that one should be denied the right to challenge the legality of an administrative order supporting an indictment brought to enforce the order. The Select Committee to

Investigate Executive Agencies, in its Second Intermediate Report (H. R. 862, 78th Congress, 1st Session, page 5), condemned the conclusion reached by this court in *Yakus v. United States*, 321 U. S. 414. In that report the Committee said: "That a citizen may be indicted, tried, and convicted for violation of an illegal regulation or order made by an executive agency, without having the right to plead such invalidity in the court where he is indicted and tried is, indeed, a novelty in our jurisprudence, and if sustained by the courts it should be immediately corrected by amending the act."

The decision of this court in *Falbo v. United States*, 320 U. S. 549, does not support the argument of the Government that this court held a registrant must submit to induction as a condition precedent to obtaining judicial review of the illegality of the draft-board order. All that the *Falbo* decision held was that no judicial intervention to determine the illegality of the action of the draft board could be made which would disrupt the selective process—the process leading up to the selection and acceptance of registrants by the armed forces. The *Falbo* decision was confined to the narrow question of "whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." Mr. Justice Black said that Congress was not required to provide judicial review "before final acceptance of an individual for national service. . . . The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. . . . Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so." (pp. 554-555)

It seems plain that the decision in *Falbo v. United States* (320 U. S. 549) was a procedural decision on administrative law, announcing the fundamental proposition that judicial

intervention of administrative action cannot be made until all administrative remedies have been completed. (*Myers v. Bethlehem Shipbuilding Corp'n*, 303 U. S. 41) That this is the correct construction to be placed upon the *Falbo* decision seems to be supported by the decision of this court in *Billings v. Truesdell*, 321 U. S. 542. There it was stated that it was necessary for one to report at the induction station in order to exhaust his administrative remedies, but that he could not be forced to submit to induction because if he were forced to be inducted that would make a trap of the *Falbo* decision. The trap referred to appears inexorably to be submission to induction as a condition precedent to judicial review after a completion of the selective process. Cf. Biggs, C. J., dissenting, *United States v. Estep* (CCA-3) 150 F. 2d 768, No. 292 October Term 1945, certiorari granted Oct. 8, 1945, Record p. 301.

Yakus v. United States (321 U. S. 414) does not support the conclusion of the court below and the argument of the Government, that submission to induction is necessary to completely exhaust all administrative remedies. The decision in the *Yakus* case is distinguishable because there yet remained in that case a clear statutory remedy under the Act by appeal to the Emergency Court and thence to this court by petition for writ of certiorari. Of course, if a statutory remedy is provided in an act creating an administrative agency which suffices to protect the interest of the person involved and he fails to avail himself of such administrative remedy, he has not exhausted the administrative process so as to qualify himself for judicial review. There is no such provision in the Selective Training and Service Act for appeal to the Emergency Court. Therefore the *Yakus* decision can be put aside as distinguishable because falling in the same category as do *Falbo v. United States* (320 U. S. 549) and *Myers v. Bethlehem Shipbuilding Corp'n* (303 U. S. 41).

Frequently it has been argued that there is no right to judicial review of the illegal action or unlawful determina-

tion of a draft board because there is no constitutional exemption of ministers from military service. Such argument is beside the point. It is begging the question. It is entirely immaterial whether one is constitutionally exempt from military service in deciding whether an administrative tribunal has exceeded its jurisdiction, acted arbitrarily, or violated the rights of a person to procedural due process contrary to the Fifth Amendment to the Constitution. There are hundreds of administrative agencies, created by scores of acts of Congress, that operate in fields of human endeavor where there are no constitutional guaranties whatever. Nevertheless the courts have unhesitatingly allowed judicial review of administrative lawlessness in all these fields where the rights of the persons involved are not protected by some express mandate of the Constitution. Indeed, administrative agencies are as much subject to the restraint of the due process clause of the Fifth Amendment as are judicial and legislative bodies. Regardless of whether the subject matter is guaranteed by the Constitution, one is still entitled to fair dealing and honest determination at the hand of administrative agencies. Absence of a constitutional guarantee of the subject matter regulated by the administrative agency does not confer upon draft boards unlimited authority to act as tyrants and oppressors and to become the sole judges of the extent of their power. They are restrained by the same rules of administrative law that govern all other administrative agencies. It is this restraint that is desired to be placed upon the draft boards here.

The fact that the authority of Congress may be unlimited by the Constitution in the raising of an army in time of war does not help the Government in its argument here. Congress did not assume unlimited authority inherent in it under the Act. Congress exempted ministers from training and service. The failure of Congress to draw upon its full reservoir of authority definitely rejects the assumption that the draft boards may assume all powers not invoked

by Congress. The fact that the Constitution does not provide a "red-light" for the draft boards does not justify the draft boards running the "stop-sign" erected by Congress in providing for exemption of ministers of religion.

The fact that judicial review was given by habeas corpus under the 1917 Act should prove that it is not necessary that a minister have a constitutional right to exemption from military service before he can attack an illegal order or an arbitrary determination of a draft board. Indeed, the Government suggests that petitioner has a remedy by habeas corpus to attack such actions. Therefore, if the lack of constitutional guarantee does not forbid judicial review in habeas corpus proceedings, then by force of the same reasoning it does not preclude judicial review in defense to an indictment. These views have the support of Chief Justice Hughes who said: "Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determination of fact deemed to be jurisdictional, as underlying the authority of executive officers has been recognized." *Crowell v. Benson*, 285 U. S. 22, 58.

The Government contends that refusal to submit to induction constitutes such flouting of the law, defiance of the Act, and failure to co-operate in effective law enforcement of such a great degree that one guilty of such misconduct is precluded from judicial intervention to protect his rights against the lawlessness of draft boards that ordered him to report contrary to the Act. The Government likens the failure to comply with an order to report for induction to a situation in which a prisoner is indicted for escaping from a penal institution, contrary to law, is denied the right to show that his original sentence was invalid, in defense to prosecution for breaking jail. *Bayless v. United States*, 141 F. 2d 578, certiorari denied 320 U. S. 748; *United States v. Jerome*, 130 F. 2d 514, 519, cert. den. 317 U. S. 606.

Again it has been unfairly compared to a person illegally resisting arrest in spite of his innocence of the crime for

which he is apprehended. *Giese v. United States*, 143 F. 2d 633, 635, aff'd per curiam 323 U. S. 628. These analogies are wholly inapposite.

In the case of a person guilty of forcibly breaking out of custody the offense is separate and distinct and the enforcement of the law which he is charged with violating is in no way dependent upon the prosecution and judgment that committed him to the institution. In the situation here, the prosecution is based directly upon an administrative order and it is not a separate crime, as in the case of a fugitive from a prison. The unlawful resistance of arrest based upon a valid warrant is not analogous. In such case there is opportunity to determine the issue raised at a later step in the judicial proceedings instituted by the warrant for arrest; whereas in the present case an effort has been made to have a judicial determination of the validity of the order (which is analogous to the warrant) but such judicial determination was denied.

Assuming, however, that the analogy of resisting arrest is in point, if the warrant was invalid the person arrested could forcibly resist the officer to the point of killing, if necessary, in self-defense, without violating any law. Moreover, the order of the draft board is not analogous to a warrant, commitment or judgment so as to constitute legal process valid on its face. It is an order of an administrative agency, and its validity depends not upon the recitals appearing on the face of the order but upon the authority and jurisdiction of the draft board to act. Therefore it is incumbent upon the Government to prove that the draft board had jurisdiction over the registrant and authority to classify him as liable for training and service and to order him to report. In other words, the resistance or failure to comply with the order that precipitates the judicial proceedings is sufficient to place in issue the legality of the process so as to require judicial review of its validity.

If the Government's argument of resistance or defiance of the law is carried to its logical conclusion, then practically

every defense in every criminal case could be denied. Mere defiance of a draft-board order by refusal to abandon civilian status and submit to military jurisdiction does not constitute flouting the law so as to forfeit the right to challenge the validity of the administrative action on which it is based. Even persons guilty of murder, rape and treason are entitled to due process of law in criminal proceedings charging them with their respective crimes. The murderer has the right to show in defense to an indictment that he shot in self-defense. The rapist has the right to show that the act was committed with consent. If flouting the law by refusing to comply with the draft-board order is ground for denying a registrant the right to challenge its validity, then by force of the same reasoning all other defenses in every other criminal trial could be denied because they, too, flouted the law by violating it.

The argument that denial of the defenses discourages violation of the Act is equally specious and factitious. If that theory were true, then the lawmakers and law-enforcers have overlooked an effective way of preventing crime. If true, that denial of defenses discourages commission of crime, then it should be applied in every case, which would lead to the conviction of the innocent as well as the guilty.

The doctrine of denial of defenses because of contempt of the law and flouting the orders of administrative and judicial officers has never been approved by this court. In *Hovey v. Elliott*, 167 U. S. 409, 413-415, 417-418, this court reversed a judgment where the answer of the defendant had been stricken because of contempt of court. The court held that the entry of the judgment without affording an opportunity to defend was a violation of the citizen's rights of due process.

The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor v. McVeigh*, 93 U. S. 274, 277-278. There the court said: "Wherever one is assailed in his person or his property, there he may defend, for the liability

and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations." See also *McVeigh v. United States*, 11 Wall. 259, 267; *Bradstreet v. Neptune Ins. Co.*, 3 Summ. (U. S.) 600, where it is said: "It is as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

The host of lower court decisions holding that habeas corpus after induction is the only remedy fail to point to any part of the Selective Training and Service Act of 1940 that justifies such conclusion. Indeed, the first decisions under the 1940 Act (*United States v. Grieme* (CCA-3) 128 F. 2d 811; *United States v. Kauten* (CCA-2) 133 F. 2d 703) that became the precedents for the multitude of decisions which followed, assumed that habeas corpus was available as the only remedy because of the numerous decisions under the 1917 Act (40 Stat. 76, 50 U. S. C. 226, "Selective Service Law of 1917"), which provided for automatic induction. The nature of the 1940 Act is altogether different from the 1917 Act. The present Act provides for induction upon the registrant's voluntarily participating in an induction ceremony following selection. A registrant is not automatically subject to military jurisdiction until he submits to the induction ceremony. After having completed the selective process he is confronted with the induction process. He has the choice of submitting to military jurisdiction and becoming amenable to the rigid rules and regulations of the armed forces, or the choice of refusing to submit to the induction ceremony and being prosecuted in the district courts pursuant to the criminal sanctions clause (Sec. 11) of the Act. *Billings v. Truesdell*, 321 U. S. 542.

It seems that if Congress had contemplated habeas corpus as the remedy it would not have adopted Senator Bone's amendment to the Burke-Wadsworth Bill and made it a part of the 1940 Act. If Congress intended that all persons subject to the jurisdiction of the boards should perform military service and that habeas corpus was the only method of attacking the invalidity of the administrative actions, it would have provided expressly for habeas corpus as the only remedy, or would have made the method of induction the same as or similar to the induction process of the 1917 Act. For the 1940 Act Congress must have had in mind to eliminate habeas corpus as a remedy, entirely. The operation of the 1917 Act showed that habeas corpus after induction as a remedy for reviewing the determinations and orders of draft boards resulted in a dangerous interference with the training of the armed forces in time of national peril. The situation was depicted by the Provost Marshal General in his final report to the Secretary of War, where, *inter alia*, he said: "During this draft the practice of serving writs of habeas corpus on the officers of the bureau became so prevalent as to interfere seriously with the progress of the business." The fact that the courts have universally entertained applications for writs of habeas corpus under the 1940 Act does not prove the Congressional intent that habeas corpus should be the remedy. There are other considerations that lead to the conclusion that habeas corpus was not contemplated by Congress as a remedy.

Congress intended that those charged with the training of men for service in the armed forces should be free from any outside influences or litigious interruptions that would defeat the purpose of effectively training the army. While it may be more convenient for the Selective Service System and the Department of Justice to demand that one submit to induction and then test the validity of the order on a writ of habeas corpus, it is certain that it would be highly inconvenient to the armed forces and throw a great burden upon

the Army and the Navy if such were the sole remedy of settling controversies between registrants and their respective draft boards. In that event the armed forces are bothered and burdened with an answer to and litigation of petitions for writs of habeas corpus. It seems obvious that Congress intended to remove litigious controversies between registrants and draft boards from the armed forces and to confine them to the federal district courts. Allowance of the defense in criminal cases presents a lesser danger to raising an army and navy than allowance of review by habeas corpus presents a danger to training and service. The very fact that Congress provided for prosecutions under Section 11 of the Act in the district courts shows the desire of Congress to eliminate entirely litigious interruption of training and service. No theory of policy or practicability to the Selective Service System and the Department of Justice supports the distortion of the obvious intent of Congress.

Induction is, moreover, a process separate from selection, as has been seen. (*Billings v. Truesdell*, 321 U. S. 542) Induction is the result of a voluntary step taken by the registrant at the induction ceremony, indicating his willing submission to induction. Since submission to induction is voluntary, there is present the issue of waiver of the right to challenge the administrative action and a waiver of the right to the writ of habeas corpus. The voluntary submission to induction is the same as voluntary submission to custody for the purpose of securing the writ of habeas corpus. The courts have held that such voluntary submission constitutes a waiver of the right to the writ of habeas corpus. *McNally v. Hill*, 293 U. S. 131, 135-139; *Baker v. Grice*, 169 U. S. 284, 293-294; *Ex parte Simon*, 208 U. S. 144. Compare *Estep v. United States*, CCA-3, 150 F. 2d 768. Biggs, J., dissenting, at pages 302 to 303 of *Estep* record.

Moreover, habeas corpus after submission to induction cannot be constitutionally required as the only remedy for judicial review of an illegal draft-board determination.

because it requires the registrant to submit himself to greater penalties than the law otherwise would require in order to procure judicial review. Such penalties are so serious as to dissuade the most courageous of registrants. *Ex parte Young*, 200 U. S. 123, 147; *Wadley Sou. Ry. v. Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co. v. Love*, 252 U. S. 331.

By submitting to induction the registrant abandons his civilian status and all civil rights. Immediately he becomes amenable to the military law. For slightest infractions of military regulations he is punishable at the pleasure of court-martial tribunals without recourse to the civil courts. His voluntary entry into the armed forces even for the purpose of settling a controversy is a grave step, fraught with dangers and serious consequences. His new responsibilities as a soldier cannot wait until he has settled his controversy by habeas corpus in the civil courts. A failure to strictly and promptly comply with all military orders may bring the death penalty. (Articles of War, Art. 64, Sec. 1, chap. 2, Act of June 4, 1942, 41 Stat. 787; *Manual for Courts-Martial, U. S. Army* (1928), page 218.) The fact that he may have the right to petition the civil courts for a writ of habeas corpus does not save him from being court-martialed or incurring the most severe penalty of military law. If he is found to be subject to military jurisdiction, then for him military rules and regulations are due process of law. If he fails to file his petition or for any reason is unable successfully to prosecute it in the trial court and upon ultimate appeal to this court, he is certain to be subjected to severe penalties if he attempts to claim his rights or settle his differences with the draft boards in the armed forces. Penalties thus incurred in order to obtain judicial review by way of habeas corpus are far more severe than any that might be inflicted should he be unsuccessful in the civil courts.

Irreparable injury to which he is thus subjected, if forced to submit to induction as a means of testing the

validity of the order, must be conceded to be greater than any inconvenience or injuries this court has held in other cases to be grounds for allowing judicial review prior to compliance with administrative process.¹ In World War I there were over 500 court-martial cases of conscientious objectors.² Records of the Office of the Judge Advocate

¹ Grave problems faced by civil and military authorities in the last war are calmly analyzed in "The Conscientious Objector" (21 *Columbia U. Q'terly* 253) (1919) by Harlan F. Stone; see also, *Statement by the Third Assistant Secretary of War Concerning the Treatment of Conscientious Objectors in the Army* (1919), Government Printing Office; *The Conscientious Objector* (Boni and Liveright, New York, 1919), Walter Guest Kellogg, Major, Judge Advocate, U. S. A., chairman, Board of Inquiry.

² The *Statement* (Note 1, *supra*) includes the following summary of court-martial cases of conscientious objectors compiled to June 7, 1919. (pp. 53-54):

Tried by courts-martial	504
Acquitted	1
Convicted and sentenced	503
Disapproved:	
By reviewing authority	3
On recommendation of Judge Advocate General	50
Effective sentences	450

ORIGINAL SENTENCES OF COURTS

Death	17	2 years	3
Life	142	50. "	3
10 years	89	8 "	1
20 "	73	11 "	1
25 "	57	12 "	1
15 "	47	13 "	1
5 "	29	18 "	1
30 "	19	28 "	1
3 "	5	45 "	1
1 year	4	99 "	1
40 years	4		
Less than 1 year	3		
			503

(Concluded on next page)

General show that "since Pearl Harbor" the treatment of Jehovah's witnesses and conscientious objectors inducted has been severe.³ To one not subject to duty of training and service imposed by the Act, the order to report for induction is the equivalent of an order banishing him from his position in society, and is, therefore, a very severe penalty, and one to which he should not be required to submit without opportunity for judicial review.

Thus it is apparent that if one is forced through duress to submit to induction in order to obtain judicial review, a trap has been made out of the *Falbo* case, as was stated by Mr. Justice Douglas in his opinion in *Billings v. Truesdell*, 321 U. S. 542, 554-555.

Moreover, if the registrant is not sufficiently courageous to defy the representatives of the armed forces, or if he should desire to render military service and thus stay at peace with the armed forces and avoid court-martial trouble and controversy with the military authorities until his habeas corpus proceedings are successfully terminated,

(Concluded from preceding page)

SENTENCES AS FINALLY EXECUTED AFTER REVIEW BY
REVIEWING AUTHORITIES AND BY JUDGE ADVOCATE GENERAL'S OFFICE

25 years	166	35	"	1
10 " " "	94	8	"	1
15 "	65	11	"	1
20 "	49	12	"	1
5 "	32	13	"	1
30 "	18	18	"	1
3 "	8	23	"	1
1 year	4	Sentence disapproved		
Less than 1 year	2	and accused released		53
2 years	2	Sentence suspended		1
50 years	2			
				503

Sentences mitigated by reviewing authorities	185
Sentences mitigated on recommendation of Judge Advocate General	11

³ Brutality suffered at hands of military authorities by some of Jehovah's witnesses who reported for induction has also been noticed in the public press; e. g., *Time* magazine, April 19, 1943, p. 26.

it is likely that he will have been held to have waived his right to challenge military jurisdiction. It has been so held in some cases. *Mayborn v. Heflebower* (CCA-5) 145 F. 2d 864, cert. den. 65 S. Ct. 1087; *Catorolo v. Hibbs* (CCA-5) 145 F. 2d 866, cert. den. 65 S. Ct. 1087.

The requirement of submission to induction as a condition precedent to judicial review is tantamount to trial by ordeal and trial by battle that flourished in the days of the Inquisition and the "dark ages". It is like telling a man to walk barefooted over glowing coals or over red-hot plowshares before giving him an opportunity to be heard. *Encyclopedia Americana* (1940 ed.) Vol. 20, p. 752; cf. *Hurtado v. California*, 110 U. S. 516, 529.

Furthermore, to require one to submit to induction, especially in the case of a minister who has conscientious objections to military service, is tantamount to imposing a test oath which it may be impossible for him to take, and thus judicial review is forever withheld because he refuses to violate his conscience. *Cummings v. Missouri*, 4 Wall. 277, 320-332.

Surely Congress did not intend to deny judicial review to exempt persons solely because they would not submit to a surrender of their rights, their conscience and their covenant with Almighty God by taking an oath or going through a ceremony in order to get judicial review. It can be easily understood why Congress would require one to submit to induction in order to raise an army or navy, but it is inconceivable that Congress would limit judicial review of illegal draft-board action affecting an exempt person to such time that such exempt person has submitted to induction.

Induction is "the end product of submission to the selective process and compliance with the orders of the local board." *Billings v. Truesdell*, 321 U. S. 542. If the Act be given a construction so as to require an exempt registrant to submit to the end result, then an innovation has been made in the field of administrative law never heretofore heard of. Such novel interpretation requires the aggrieved

person to comply with and satisfy the final judgment and order of the administrative agency before attacking it. Never heretofore has such a rule been invoked in the field of administrative law. It would be extending the doctrine of *Myers v. Bethlehem Shipbuilding Corp'n* (307 U. S. 41) and *Endicott-Johnson Corp'n v. Perkins* (317 U. S. 501) entirely too far. It is stretched to the breaking point. Final orders of administrative tribunals do not stand on any higher plane than do the final judgments of judicial tribunals. A litigant cannot be required to satisfy a judgment rendered against him before he can obtain relief or appeal from the illegal judgment rendered against him. There is no reason or justice to require an exempt person to satisfy and fully comply with the final order of the draft board by submitting to induction as a condition precedent to obtaining judicial review. It is entirely unreasonable to suppose that Congress would provide for the exemption of ministers in Section 5 (d) of the Act and then say that such exempted person would have to submit to induction in compliance with the order which is the result of administrative lawlessness before the exempt person can protect himself and secure judicial relief.

It is wholly figmentary to contend that Congress intended that the vice-president of the United States, all members of Congress, all members of the legislatures of the states of the Union, all governors and all judges of all courts of record, can be required to submit to induction and assume military status before they would be entitled to protect themselves from illegal usurpation of authority by the draft boards contrary to the Act of Congress. While it may be assumed that a writ of habeas corpus is an adequate remedy to protect the rights of a registrant *not exempt* and who is liable for training and service under the Act, it is quite certain that Congress did not intend that habeas corpus should be the only remedy available to a registrant exempt under the Act. By providing for prosecution of alleged delinquents in the federal district court,

and by writing into the Act a provision for the exemption of ministers of the gospel, it is clear that Congress did not intend that such class of persons should surrender all civil rights as a condition precedent to judicial review. It is fantastic to suppose that a civilian exempt from duty should give up his liberty and assume military status as the cost for a judicial determination of the administrative lawlessness from which he suffers. Certainly Congress did not intend that exempt persons should surrender their right to a speedy and public trial in the neighborhood of their homes as payment for failure to comply with the illegal order of the draft board.

As compared to the right to challenge the invalidity of the draft-board order in defense to an indictment brought in the district court, the writ of habeas corpus after induction is wholly illusory. It has been suggested as a remedy and dangled before the eyes of the exempt registrant in an effort to force him, coerce and cajole him into submitting to induction and assuming military status. It is fundamental that the petition for writ of habeas corpus can be brought only where the inductee is held in custody, or where his superior officer of the armed forces is located, or where the civilian public service camp is situated. The place where an inductee may apply for a writ of habeas corpus is frequently hundreds, if not thousands, of miles away from the scene of the controversy. The inductee is at a distinct disadvantage, being removed to such distance from his home that he is out of touch with friends, relatives, and counsel. Moreover, habeas corpus being a civil action that requires the inductee to make the initiating move, it may not be available to him because of lack of funds or other reasons. The difficulty of obtaining witnesses and securing records at such great distance from the place where the draft board is located frequently would make the application for writ of habeas corpus impossible, impractical or impotent.

It is almost always the case that when a selectee classified as a conscientious objector is ordered to report for work

of national importance at a civilian public service camp he is required to travel halfway across the country, and sometimes all the way across the continent, to reach the camp designated for his internment for work. In the case of one inducted into the armed forces, he may be immediately taken to some military camp thousands of miles away from his home. Indeed, he may be shipped to some foreign shore where the writ of habeas corpus is wholly unavailable. Frequently inductees in the armed forces are moved from one camp to another, out of the jurisdiction of one federal district to another federal district. Being kited around in that manner, it is obvious that one petition after another could be dismissed. Indeed, one appeal after another could be dismissed, the reason for dismissal being that the transfer of the prisoner would make the action moot. *Weber v. Squire*, 315 U. S. 810; *Ex parte Weil*, 317 U. S. 597; *Turnello v. Hudspeth*, 318 U. S. 792; *Zimmerman v. Walker*, 319 U. S. 744.

In *Hirabayashi v. United States* (320 U. S. 108, 109) the reference by Mr. Justice Douglas, in his concurring opinion, to that line of cases under the 1940 Act which require that the registrant must submit to induction and obtain habeas corpus to review the legality of the action of the draft board is not a holding that is precedent on the question presented here. His opinion was written before the decision of this court in the case of *Falbo v. United States* (320 U. S. 549). Whatever may be said as to his dictum in the *Hirabayashi* case, it seems plain that what he said in the court's opinion in *Billings v. Truesdell* (321 U. S. 542), where the Act in question was directly under consideration, would be of greater weight and throw more light on the question here involved than would his dictum in the *Hirabayashi* case.

It is manifest that the Act is silent as to habeas corpus as a remedy. There is nothing in the Act and there is nothing in the Regulations that even intimates that habeas corpus after induction is available as a remedy. Indeed,

there is nothing in the Act or Regulations that says anything about judicial review of illegal draft-board action. Moreover, there is nothing in the Act or Regulations that suggests induction as a part of the process to obtain relief from unlawful action of the draft boards. Consequently, the petition for writ of habeas corpus is not an administrative remedy. It is a judicial remedy that has been devised by the courts. A registrant illegally abused by the draft boards is not required to exhaust judicial remedies before claiming his rights. The maxim of exhausting remedies before appealing to the courts is confined to the exhaustion of *administrative* remedies expressly provided for in the Act. It has been held that a person is not required to exhaust judicial remedies before invoking judicial review of administrative action in the manner chosen. *Lane v. Wilson*, 307 U. S. 268; *Railroad & W. Comm'n of Minn. v. Duluth-St. Ry.*, 273 U. S. 625.

Submission to induction does not contemplate an administrative hearing on the claimed exemption from duty. When one submits to induction the armed forces do not settle his dispute with the draft boards except that if he fails to render faithful obedience to all military orders the inductee will be promptly court-martialed. Further steps that do not contemplate a hearing or administrative relief to the inductee need not be complied with. *Kansas City So. Ry. v. Ogden Levee Dist.* (CCA-8) 15 F. 2d 637.

Since the Government cannot point to any administrative step under the Act after induction into the armed forces that would provide for the protection of the inductee from court martial for refusal to perform military service, exempt him from military duty until his controversy was settled, and protect his rights to exemption from duty under the Act by correcting the illegal administrative action by the armed forces, it cannot be said that induction is necessary in order to completely exhaust available administrative remedies. Certainly induction is not a part of administrative remedies contemplated to protect the rights

of registrants from the lawlessness of draft boards acting in defiance of the Act and Regulations.

To hold that habeas corpus is the only remedy under the Act is judicial legislation which perverts the 1940 Act into a form exactly like the 1917 Act. Congress did not intend that induction and habeas corpus, as judicial remedies for illegally treated registrants, should be dangled before their eyes as a means of relief in order to cajole them into voluntary enlistment in the armed services. Thus through coercion and duress applied to an illegally treated registrant the Act would be and, indeed, has been transformed into an act very similar to the 1917 Act that casts into the armed forces the controversy between the registrant and the draft board, which is the very evil Congress intended to avoid by providing in the 1940 Act for prosecutions in the federal district courts through adopting Senator Bone's amendment to that Act. If the silence of the Act does not prohibit the admitted review by habeas corpus, because of the constitutional guarantee of the writ, then by stronger reasoning the due process clause requires that silence of the Act about available defenses against prosecutions under the criminal sanctions clause of Section 11 does not deny review of illegal draft-board action in defense to the indictment.

If silence of the Act is ground to deny judicial review in criminal action, then the courts ought to deny all judicial review, including review by habeas corpus, on the ground of silence of the act.

The Government has confused the selective process with the induction process in arguing that administrative remedies are not exhausted until the registrant has submitted to induction. The administrative remedies, for the purpose of determining when there shall be judicial review, terminate when the registrant goes to the end of the *selective* process and when his next step would be to enter into the armed forces or a civilian public service camp.

Acceptance of the registrant, making him a selectee

under the Act, terminates the *selective* process and his administrative remedies. See the discussion of the various regulations pertaining to selection and induction in *Billings v. Truesdell*, 321 U. S. 542, where the distinction between selection and induction is defined and preserved.

In instances where this precise question has been taken before the appellate courts of some of the states, it has been held that one proceeded against in a criminal prosecution may show in defense thereto that the administrative determination was illegal, in excess of authority conferred by the statute, arbitrary and capricious, or contrary to the undisputed evidence. *People v. McCoy*, 125 Ill. 289, 17 N. E. 786; *Fire Dept of City of N. Y. v. Gilmour*, 149 N. Y. 453, 44 N. E. 177; *State v. Rachshowski*, 86 Conn. 677; *People v. Kaye*, 212 N. Y. 407, 416; *State v. Weimer*, 64 Iowa 243; *State v. Kirby*, 120 Iowa 26; *Crane v. State* 5 Okla. Cr. 560; *Richter v. State*, 16 Wyo. 437.

The Massachusetts Supreme Judicial Court said: "He would have a right to a trial by jury as to the existence of the fundamental facts upon which the jurisdiction of the inspector rested, when a criminal prosecution or proceedings in equity were instituted against him for failure to comply with the requirements imposed by the inspector." *Stevens v. Casey*, 238 Mass. 368, 117 N. E. 599.

Throughout the history of this court it has been held that acts of Congress are subject to judicial review. This was first established in *Marbury v. Madison*, 1 Cranch 137.

Are the acts of administrative agencies on a higher plane than the acts of Congress?

Must it be said that the determinations of administrative agencies are beyond judicial review in defense to indictments charging one with a violation thereof?

If true, then a new era has been reached in the history of this government. If so, then Congress is found to have created a gigantic administrative instrument that can develop into a Frankenstein monster with powers even greater than Congress has—the unique power of acting free

of all judicial restraint. In this situation the courts will appear to have been bled lifeless, with judicial power, wholly impotent to protect the rights of the citizen. This situation is contrary to the conception of government envisioned by the framers of the Constitution in adopting that document of fundamentals of government.

"No conviction is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government, no government. I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is the protecting power of the whole government."—Daniel Webster (*Webster's Works*, Vol. 3, p. 176).

B

A reasonable interpretation of the Constitution compels a construction of the Act allowing Smith and Estep their defenses to the indictment so as to avoid the Act's abridging the Constitution.

I. If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, Smith and Estep will be denied their right to due process, judicial trial, and right of trial by jury, contrary to Article III and the Fifth and Sixth Amendments to the Constitution.

The law of the land in all common-law countries, boasting as they do of enlightenment and liberty, requires that one indicted for crime shall have the right to defend by proving his innocence. The mere bringing of an indictment implies that the one indicted shall have the right to defend. Throughout history this right has been recognized. In *Doctor Bentley's Case* (*Rex v. Cambridge University*, 1718, 1 Strange 557, 567) a hearing and defense was denied. In setting aside the judgment of conviction, the court said:

"The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam (says God), where art thou? Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." *Genesis* 3: 9, 11, 13.

The barbarians and ancients permitted a defendant to be heard and to make his defense. Seneca, the Roman philosopher, in the days of Nero wrote:

"Who hath adjudged of aught, one side unheard, just though the judgment, were himself unjust."

In his work, *Due Process of Law*, McGehee says: "Justice requires that a hearing and an opportunity to present defenses must precede condemnation. Around this ideal of justice has grown up the constitutional conception of 'the law of the land' or 'due process of law', but the ideal was not confined to one system of jurisprudence, and was common to thoughtful men everywhere." (Page 73)

No better definition of the term "due process of law" can be given than that stated by Daniel Webster in the *Dartmouth College* case. (*Dartmouth College v. Woodward*, 4 Wheat. 519) In his argument there he said: "By the law of the land is most clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." See Cooley, *Constitutional Limitations* (8th ed.), Vol. 2, p. 736; *Works of Webster*, Vol. V, p. 487.

In *McVeigh v. United States*, 11 Wall. 259, 267, this court said that when one is assailed by an indictment or proceeding in the United States District Courts "he could

defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administrative of justice."

In *Rogers v. Peck*, 199 U. S. 425, 435, this court said that defendant in a criminal case must be given an adequate and full opportunity to be heard in defense to an indictment.

In *Ong Chang Wing v. United States*, 218 U. S. 272, 279, the court said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, . . . with an opportunity to be heard, . . . then he has had due process of law."

The construction of the Act so as to deny judicial review of administrative action, which concededly is available upon petition for writ of habeas corpus, is a rank denial of due process of law and of the right to be heard in one's defense. *Hovey v. Elliott*, 167 U. S. 409, 413-418: "[A] more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of

the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution?"

In *Edwards v. United States*, 312 U. S. 473, this court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

This court, in *Dowell v. United States*, 221 U. S. 325, 330, held that an act whereby an administrative agency determined the facts of one's duty and the circumstances of his violation thereof, without an opportunity to be heard in his defense in court, was unconstitutional. Speaking of the constitutional provisions, the court said: "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In *Wong Wing v. United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. This court said: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." See also *Diaz v. United States*, 223 U. S. 442; *Lisemba v. California*, 314 U. S. 219, 236.

This court has declared that if a person is subjected by law to the jurisdiction of an administrative agency and is prosecuted in the district court for the crime of violating an administrative order of an "officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission." (*Panama Ref'g Co. v. Ryan*, 293 U. S.

388) This court has said that the legislature cannot withhold from the courts the power to inquire into the authority and legality of the action of an administrative agency. In *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289, the court said that ample provision should be made in the law for "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

In *Dayton Goose Creek Ry. v. United States*, 263 U. S. 456, 486, the court said: "No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under . . . the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution." See *St. Louis and S. F. Ry. v. Gill*, 156 U. S. 649, 666, where it is said: ". . . if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties." See, also, *Chicago M. & S. P. Ry. v. Minnesota*, 134 U. S. 418, 456-457, where it is said: "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as

an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The administrative agency cannot be allowed the final say as to facts determining its authority and jurisdiction, without violation of the due process clause of the Fifth Amendment. *Jones v. Securities & Exch. Comm'n*, 298 U. S. 1, 23-24.

The second circuit court of appeals has held, in *Trainin v. Cain*, 144 F. 2d 944, that if the Selective Training and Service Act of 1940 is construed so as to deny review, regardless of what may be the facts, it would be in direct conflict with the due process clause of the Fifth Amendment to the Constitution. A law which creates an administrative agency that permits the agency to be the judge of its power, and which prohibits judicial review of the illegality of the administrative determination, is a violation of the right of due process of law. "... On the other hand, to deny review, whatever may be the facts, so long as the forms of law have been followed, is to constitute arbitrary and unfair action, as was held in *Arbitman v. Woodside*, supra [258 F. 441], which is not consonant with our historic ideas of due process." *Trainin v. Cain* (CCA-2) 144 F. 2d 944. Indeed, that was the holding of this court in *Chicago M. & S. P. Ry. v. Minnesota*, 134 U. S. 418; supra.

If the Act is construed so as to deny judicial review of the alleged illegality of the draft-board order and the right of trial by jury, then the Act and the construction placed thereon are unconstitutional, because directly in conflict with the due process clause of the Fifth Amendment to the Constitution.

If the Act is construed so as to deny the exercise of the judicial function by the courts for protecting the rights of the citizen, the powers of the courts are sapped, contrary to Article III of the Constitution.

Every student of history knows that the most significant

victory for freedom of the people and justice has been accomplished by and in the courts. The liberties of the citizen are so closely bound up with the complete independence of the judiciary that all beginnings of encroachment by administrative agencies should be shunned. When for any reason the judiciary loses its functions and powers granted by the Constitution, the administration of justice is sacrificed to its enemy, despotism.

The distinguishing characteristic of the American system of government is the division of powers. The greatest feature of that division is that the guardianship of all liberty, together with the power of checking all encroachments thereon, is vested in the judiciary, which is supreme over all other departments. Haines, *The American Doctrine of Judicial Supremacy* (University of California Press, 1932), pp. 23-27.

"All the powers of government—legislative, executive, and judiciary—result in the legislative body. The concentrating these in the same hands is precisely the definition of despotic government." (Jefferson's *Works*, Vol. 3, p. 223.)

The supremacy and independence of the American judiciary were first announced by this court in *Marbury v. Madison*, 1 Cranch 137: "It is emphatically the province and duty of the judicial department, to say what the law is."

Chief Justice Taney made a studied examination of the history of the judiciary and its powers in the appendix to his opinion in *Gordon v. United States*, 117 U. S. 697. The fact that honest and well-intentioned persons have been persuaded that the rights of the citizens are perfectly safe in the hands of executive agencies does not remove the danger that inheres in denying the judicial function review of such agencies' determinations.

In *Dyson v. Attorney General* (English Court of Appeal) 1911, 1 K. B. 410, 423, 424, Lord Justice Farwell said, *inter alia*, "... there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour

of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. . . . In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case which, treating the allegations as true (as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deane v. Attorney General* (1 Y. & C. Ex. at p. 208): 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred.' I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression."

The very purpose of the judiciary was that it might stand like a great rock to which the citizen may flee, set his feet and be safe amidst the torrents and shifting currents of public policy. The inevitable inequalities that flow from administrative action are not so dangerous in a country where the administrative agency and every citizen know that the acts of the administrative agency are subject to judicial public scrutiny in a court of law. There the citizen cannot be delivered over to a department and forced to submit to the judgment of an administrative agency which acts as prosecutor, witness and judge at the same time.

On the occasion of his introducing the proposals for the first ten amendments to the Constitution, Mr. Madison said concerning the courts that they would "consider themselves in a peculiar manner the guardians of those rights; they would be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." (1 *Annals of Congress*, 439)

In *Crowell v. Benson* (285 U. S. 22, 56-58) it was held that Congress could not completely oust the courts of the power to review all determinations of fact and law of administrative agencies. The court said that to make the determinations final and place them beyond reach of the courts on review "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system . . ." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 50-52.

Those who favor denial of judicial review of draft-board findings advocate that there would be an endless stream of litigation, which would frustrate the intent of Congress. That contention lacks candor. It is an adroit way those who favor the supremacy of the administrative agency over the courts have in arrogating to themselves despotic powers. They say that the purpose of that is to save the citizen the burden and expense of lawsuits. Really what is desired is that the administrative agency be left to be the final and supreme arbiter of the extent of its power. The reason courts exist in the civilized community is that the founders of the government believed that happiness consisted in the greatest possible amount of litigation among the greatest possible number of citizens. The value of having courts of law is not in the number of cases decided by them. On the contrary, it is the universal knowledge of their existence and faith in justice which reduces to a minimum the number of administrative

agencies and citizens willing to behave so as to expose themselves to the jurisdiction of the courts. Knowledge that the court machinery exists and that when the judicial function is exercised it is employed impartially and with skill has the effect of rendering its employment unnecessary except in unusual and extraordinary cases. (Hewart, Lord Chief Justice of England, *The New Despotism*, Ernest Benn, Ltd., London, 1929, pp. 154-155, 156)

"By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. . . . The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them." (Cardozo, *The Nature of the Judicial Process*, New Haven 1921, pp. 92-94)

"In Anglo-American jurisprudence, government and law have always in a sense stood opposed to one another; the law has been rather something to give the citizen a check on the government than an instrument to give the government control over the citizen. (See Sir J. F. Stephen, *History of the Criminal Law*, ii, 65) There is a famous passage, which was long attributed to Bracton, to the effect that 'the King has a superior, to wit; the law; and if he be without a bridle, a bridle ought to be put on him, namely, the law.' (Bracton, fol. 34; see McIlwain, *High Court of Parliament*, p. 101; Maitland, *Bracton's Note Book*, i, 29-34.) This 'rule of law', as Dicey calls it, or 'supremacy of law', in Lieber's phrase, has been uniformly treated as the

central and most characteristic feature of our Anglo-American juristic habit; and nothing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts of the common law. That government officials, on the contrary, should themselves assume to perform the functions of a law court and determine the rights of individuals, as is the case under a system of administrative justice, has been traditionally felt to be inconsistent with the supremacy of law. It was the ground of attack on the Court of Star Chamber, and on equity jurisdiction in the days when the Chancellor was still mainly an administrative officer of the King. Lieber mentions freedom from 'government by commissions', and from the jurisdiction of executive courts, as one of the elements of Anglo-American liberty." (Dickinson, *Administrative Justice and the Supremacy of Law in the United States*, Harvard University Press, 1927, pp. 32-33).

■

II. *If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, the Act will be transformed into a bill of pains and penalties contrary to Article I, Section 9, Clause 3 of the Constitution.*

"No bill of attainder or *ex post facto* law shall be passed." •

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the

* Art. 1, Sec. 9, Cl. 3. Recently Mr. Justice Black had occasion to stress that provision of the Constitution and this court's decision relative thereto in *Cummings v. Missouri*, 4 Wall. 277, in his concurring opinion in *Keegan v. United States*, No. 39 October Term 1944, decided June 11, 1945 (65 S. Ct. 1203); and also in a dissent: *In re Summers*, No. 205 October Term 1944 (65 S. Ct. 1307).

Constitution, bills of attainder include bills of pains and penalties." *Cummings v. Missouri*, 4 Wall. 277.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the use of attainders in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of such a legislative usurpation of the judicial function, the *attainder* clause was enacted in its present form without opposition. See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462, and Vol. 3, pp. 66, 67; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

Bills of attainder and bills of pains and penalties were first used in England as early as 1321. It was not until the civil war, that engendered passions, that bills of attainder were widely used. (*The Catholic Encyclopedia*, Vol. 11, p. 59) They were particularly and extensively used during the reign of the Tudor kings to accomplish acts that could not be done through the regular judicial process. *Encyclopædia Britannica*, 1940 ed., Vol. 2, p. 656.

"A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime." Cooley, *Constitutional Limitations*, 8th ed., Vol. 1, pp. 536-539.

"The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the

most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." Story, *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216.

Here the Act and Regulations have been construed so as to require the petitioner to surrender himself to the military authorities by submission to induction, as a condition to obtaining judicial review. If he does not surrender himself and submit to the jurisdiction of the armed forces as commanded, upon his trial he is conclusively presumed to have had a duty for training and service and of having violated such duty under the Act. In defense to the indictment he cannot show that he had no duty under the Act. This is a denial of a judicial trial. He is penalized because he defied the administrative agency. If he submits to induction, a judicial trial may be accorded him if he applies for it by petition for writ of habeas corpus.

The very fact that judicial review of the administrative action is accorded by habeas corpus to a person who submits to induction and the same is denied to a person who refuses to submit to induction is proof positive that the penalty imposed against the one who refuses to submit to induction is a denial of a judicial trial. And when so applied Section 11 of the Act is thereby transformed into a bill of pains and penalties.

While the general type of bill of attainder is any law that deprives a person of a judicial trial, history shows that there are two specific kinds of bills of attainder that flourished in England: One was where a person was commanded to report and surrender at a certain time and place. Upon his failure thus to appear he was treated as a domestic rebel, being tried upon the conclusive presumption of the duty and the violation thereof. The other kind of bill of

attainder was where a person was denied a right for his failure to undergo a ceremony or take a test oath.

This court had occasion to examine into the history of bills of pains and penalties when its opinion was written in *Cummings v. Missouri*, 4 Wall. 277, 320-332. In that decision the provisions of the Missouri Constitution and statutes providing for a certain class of persons to take a test oath were declared unconstitutional because comprising a bill of pains and penalties, contrary to the Federal Constitution, Article I, Section 9, Clause 3. In that decision this court said:

"It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher v. Peck*, 6 Cranch 137, Mr. Chief Justice Marshall, speaking of such actions, uses this language: 'Whatever respect might have been felt for the States sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. ...'

"... The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be for ever banished from the realm; and that if he ever returned, or was found in England, or in any other of the King's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself [submitted to induction] before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect. (Printed in 6 *Howell's States Trials*, p. 391.) [Bracketed words added]

"'A British Act of Parliament,' to cite the language of the Supreme Court of Kentucky, 'might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it. . . . ' (*Haines v. Buford*, 1 Dana 510)

" . . . The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name."

Consideration of the method of trial followed in the courts of England that enforced the bills of attainder provides a striking analogy with the trial of petitioner and others of Jehovah's witnesses under Section 11 of the Selective Training and Service Act of 1940.

Richard Wooddeson, a learned scholar and contemporary of that dark period of English history, in one of his series of lectures at Oxford University, gives a description of the trial in his treatise *A Systematical View of the Laws of England* (1777), pages 621-648:

"All of the modes of criminal prosecutions hitherto spoken of, whether by impeachment or otherwise, are vindications of the laws in being, on which they are wholly founded. But besides the regular enforcement of established laws, the annals of most countries record signal exertions of penal justice, adapted to exigencies unprovided for in the criminal code. . . .

" . . . No alteration is made in the legal rules of evidence. Supposing the prisoner's identity of person, or his surrendering by the time limited be contested, these questions are to be decided by the same testimony as would be admissible on other trials. Neither is any varied modification of punishment. But a material innovation is made respecting the crime. For neglecting to surrender by the appointed day constitutes, or rather indeed consummates the new treason, against which the attainder is directed.

"... It is afterward removed into the King's Bench; and there the whole being entered on record, the prisoner is asked what he has to allege, why execution should not be awarded against him. If a question of fact arises, as to identity of person, or a due surrender in time, a jury is summoned to meet instanter; and, as both of these may be termed collateral issues (that is, not the general one, which in criminal cases is 'guilty' or 'not guilty') the prisoner on the one hand seems not to be entitled to peremptory challenges, but on the other, to have a right to the full assistance of counsel."

There is a close parallel between the English bills of attainder and the construction placed upon Section 11 (50 USC App. Sec. 311) of the Act in question. Under the English procedure the person named in the bill was denied the right of a judicial trial to determine his guilt if he *failed to report* and surrender or submit at the time and place mentioned in the order. For his defiance of the order he was denied the right to prove his innocence. He was conclusively presumed to be guilty.

In the criminal proceedings brought against petitioner in the district court he was denied his right to prove that he was exempt from all duty for training and service, because a minister of religion under the Act, and that he had not failed to perform a duty under the Act solely because he failed to submit to induction. At the hearing of petitioner's indictment the issue was limited in the same way that the issues upon the trial of the ancient bills of attainder in England were limited. The sole question allowed to be determined was whether or not he complied with the order.

In England, under the bills of attainder, the only question that the courts were allowed to consider was whether the accused complied with the order demanding that he report and surrender himself.

Here, the requirement that petitioner submit to induction as a condition precedent to his obtaining judicial

review of the illegality of the draft-board order is tantamount to requiring that he submit to a *test oath*.

In other words, the construction placed on the Act, so as to afford petitioner opportunity to obtain judicial review by habeas corpus, opens a way for him to escape from the penalty imposed. However, before he can be recognized by the courts and given protection of his legal rights under the Act (according to construction placed on the Act as including a way provided for him to escape the penalty), he is required to undergo a sort of expurgatory oath. Concerning a similar method of escape from penalties, this court, in *Cummings v. Missouri*, 4 Wall. 277, said:

" . . . This deprivation is punishment, nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of persons would be unable to take the oath prescribed. To them there would be no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act."

The Kentucky Court of Appeals, in *Gaines v. Buford*, 1 Dana 481, held an act of the legislature to be a bill of attainder. The legislature ordered owners of certain lands to make certain improvements on or before a certain date. Pursuant to the act, failure to comply with the order automatically forfeited the title and vested it in the Commonwealth.

In *Kentucky v. Jones*, 10 Bush (70 Ky.) 725, the Kentucky Court of Appeals held another act of the legislature violated the bill of attainder provision of the Constitution. The act provided for certain disqualifications of office-holders within the Commonwealth. Administrative agencies, called "boards of contest", were established. The findings of these boards were made final by the statute with reference

to the disqualification of an officeholder. If such boards found an officeholder to be disqualified, he was ordered to cease and desist from holding office. A refusal to cease and desist from holding the office constituted a crime under the statute. Jones was declared disqualified and ordered to vacate his office; and despite the order he held office and refused to vacate. He was indicted and convicted for failing and refusing to obey the order of the administrative agency. The court said:

" . . . it will be seen at once that the construction converts that section into a bill of pains and penalties, and thereby makes it repugnant to that clause of the federal constitution which provides that 'no state shall pass any bill of attainder'. . . . The statute created a 'contest' board, whose decision shall be final—binding and conclusive on the courts . . .

" . . . when the courts are called upon to enforce the judgments of the board, or to punish those who disobey its mandates, they have the power to inquire into and determine as to its jurisdiction in the particular case in hand. Without jurisdiction to act, the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world. . . .

"To admit that a contesting board may determine finally as to what constitutes legal disqualification for office would be to decide that the legislature, instead of confining these tribunals to the discharge of executive duties, and to the determination primarily of mere questions of fact, had, in disregard of the powers of government, existing by virtue of the first article of the constitution, created a high judicial tribunal—a court with powers and authority to determine finally and conclusively questions of individual rights arising under the constitution—and provided that it should be composed exclusively of high executive officers."

An act which undertakes to permit an administrative agency to inflict punishment, banishment or exile from the United States of a citizen, without judicial inquiry as to

whether or not he was a citizen, was held to violate the bill of attainder clause of the Constitution, in the case styled *In re Yung Sing Hee* (Circuit Court, Oregon) 36 F. 437 (1888).

A statute of Iowa which provided for "vasectomy" of habitual criminals upon the finding of an administrative agency without judicial inquiry was declared to be a bill of attainder in *Davis v. Berry*, 216 F. 413.

Friends of the bill of attainder found in the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 assert that the usual criminal defenses should be denied to defendants prosecuted under the Act in order to raise an army and navy, and that since men were automatically inducted under the 1917 Act without the right of a previous hearing in the courts the same method of handling cases under the 1940 Act had proved to be a deserving instrument of the nation for the discouraging of delinquencies and the promotion of criminal justice. The courts cannot assent to this declaration. The Spanish Inquisition may have used similar methods and sophistries but it can be confidently asserted that neither the Spanish Inquisition nor the Inquisition of Queen Elizabeth did go any further or employ a more cunning device than that employed by the government in the prosecution of Selective Service cases. See "Inquisition", *The Catholic Encyclopedia*, Vol. VIII, pp. 26-38.

Remarkable it is that scarcely any person undertakes to defend the method of trying defendants charged with failing to submit under the Act without insisting that this is a war measure and that one who fails to submit is to be regarded as the "domestic rebels" of medieval times with no rights under the law or Constitution and that the crime is of such an odious nature that it has worked a forfeiture of even those rights which peculiarly belong to criminals. It is noticed that the Constitution guarantees one charged with treason, the highest crime, with a right to a judicial trial. It is said that Jehovah's witnesses who

fail to submit to induction are nothing more than criminals. It may, for the sake of argument only, be conceded that they are such. Are they not, as such, entitled to the benefit of all the laws made for criminals? If not so, who, may it please the court, are entitled to the benefit of the laws made for criminals? If the innocent have no use for them; and if the guilty have no claim on the rights conferred by these laws, then they are mere nullities.

That the Selective Training and Service Act of 1940 was adopted and adapted in the heat of impending war and a great emergency does not change it from being penal in Section 11. That the penal provision, as construed, has taken away for the contempt of the administrative agency the most valuable of all the liberties of the citizen must be admitted by all. That the draft boards have assumed judicial magistracy, deciding questions of law and innovating on the crime must be conceded. That the rules of evidence and proofs and of judicial trial have been abrogated must be admitted. That it has instituted a modern-day inquisition trial authorizing a summary method of punishing the modern-day "domestic rebels" cannot be denied, not allowing them the benefit of criminal laws.

Under the construction placed on the Act and Regulations it must be understood that the government has claimed for the draft boards of the Selective Service System omnipotent powers and that they have been emancipated of all judicial restraint when dealing with a criminal under the Act; that is to say, one who had the conviction and courage to defy the illegal order of a board. The scope of this argument and the construction thus placed on the Act and Regulations must be denounced as breathing the worst spirit of the worst men in the worst times of history. Such has been the tyrant's plea from the beginning of history of the world. It was the claim of the first dictator, Nimrod. An Athenian Assembly or a Roman Senate in its lowest state of decadence never set up larger pretensions, nor did either ever announce a more unqualified tyranny.

The founding fathers were wise men and they labored in their day for the good of their race and posterity. They enjoyed peculiar advantages for the work which fell to their lot. They had been tried in the school of adversity. They had felt the rod of the tyrant, and knew what oppression was. It was their mission to protect their people, who were few and weak, against the many and the strong, and established fitting guards for liberty under all circumstances. The mission of the present generation is different. The people and the courts are to restrain the excessive indulgence of their own power. They are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants themselves. They are to be generous to the fallen, and just to liberty and to mankind. They have no bulwarks to erect for freedom. They need only preserve and defend such as they have.

Therefore, Section 11 of the Act has been converted into a bill of pains and penalties, contrary to the clause of the Federal Constitution prohibiting enactment of bills of attainder,

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A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of their jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

The Selective Training and Service Act of 1940 provides that "except as otherwise provided in this Act, every male citizen of the United States, every male alien residing in the United States who has declared his intention to become such citizen, . . . shall be liable for training and service

in the land or naval forces of the United States." (54 Stat. 885, 50 U. S. C. Sec. 303)

"(c) (1) The Vice President of the United States, the Governors of the several States and Territories, members of the legislative bodies of the United States and of the several States and Territories, judges of the courts of record of the United States and of the several States and Territories and the District of Columbia, shall, while holding such offices, be deferred from training and service under this Act in the land and naval forces of the United States." (54 Stat. 887, 50 U. S. C. Sec. 305)

"(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act." (54 Stat. 887, 50 U. S. C. Sec. 305)

"(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion, or

(2) Who is a duly ordained minister of religion, or

"(a) . . . (2) . . . There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. . . . Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." (54 Stat. 893, 50 U. S. C. Sec. 310)

The Burke-Wadsworth Bill when introduced in the House of Representatives and Senate (H. R. 10132) did not provide that ministers of religion be exempt from all train-

ing and service. Section 7 (c) of the bill placed regular and duly ordained ministers in the class of deferments that were discretionary with the President. A hearing was had on the bill before the House Committee of Military Affairs. Certain changes were proposed and amendments submitted for consideration. Representative Martin J. Kennedy told the committee:

"To me it seems imperative that action be taken by your committee to insure that the Wadsworth bill be so modified as to make due provision for the religious life of the American people. . . . To me it seems clear that the good of the American people requires that all these classes—clergymen, seminarians, and Brothers—be exempted from service under the bill. . . . It is evident to intelligent observers that religion is the backbone of all moral conduct; religion supports authority, teaching respect for law and order. Principles deprived from religious moral teaching make the average man an honest man, a law-abiding citizen. . . . The principle, therefore, that each man should serve where he will do the most good and best further his country's interests in time of war requires that in time of war the clergy remain clergy. That is their specialty. There they are most efficient. There they are most needed. . . . The measure to be taken, therefore, is one recognizing the principle that an adequate clergy group is a really fundamental necessity in time of war and hence, parallelly, an adequate seminarian group is a real necessity in time of preparation." (*Hearings Before the Committee on Military Affairs, House of Representatives, Seventy-Sixth Congress, Third Session, on H. R. 10132, pp. 628-630*)

Also before the Committee on Military Affairs prominent clergymen of the leading religious organizations of the world testified in behalf of the proposed amendments to the bill providing for complete exemption of ministers of religion. *Op. cit.* 299-305.

The amendments to the bill were duly approved by the committee. In due course the bill was before Congress for

consideration. In passing the Act providing for the complete exemption of ministers of religion from all training and service, Congress spoke of not taking a minister "away from his congregation" and of leaving some one at home "to preach to the people, to bury the dead and marry the youth of the land." (*Congressional Record*, Vol. 55, pp. 963, 1473, 1527)

In placing ministers of religion in the class of absolute exemptions, Congress removed the ministers from the manpower "barrel" and placed them beyond the reach of the Selective Service System. Indeed, Congress allowed the draft boards to exercise no discretion whatever in dealing with ministers of religion. In adopting the Act providing for the complete exemption of ministers, Congress intended to give persons exempt under the Act the same protection that was accorded to them under the 1917 Act. That the draft boards under the 1917 Act were considered as having no jurisdiction or authority to order ministers to take training and render service under the Act is shown in the testimony of the provost marshal general (General Crowder) before the House Committee on Military Affairs. He said:

"In the Act that is before you we have two classes of exemptions—legislative exemptions and executive exemptions. There are included in the legislative exemptions those classes whose status is determined in such a way that the administrators of this law can take cognizance of that status and eliminate them. There are other classes which are classified as executive exemptions, where a question of fact has to be determined. In the legislation of 1863 the judgment of the Board of Enrollment provided for in that legislation was made conclusive upon the authorities, notwithstanding which, however, the Courts undertook to inquire into the decision of the Enrolling Board in granting or refusing exemptions." *Congressional Hearings*, 65th Cong., 1st Sess., pp. 94, 95.

Under the 1940 Act the Director of Selective Service

recognizes that it is beyond the authority of the Selective Service System to order ministers to perform service. He sees that the exemption removes ministers from the exercise of the discretion conferred on him under the Act. "It is noteworthy that the language used in this section was not merely deferment, but exemption from training and service, although it was specifically added 'not from registration.'" (First Report of the Director of Selective Service, *Selective Service in Peacetime*, Government Printing Office, 1942, pp. 169-170) Also the Director has stated that when it is established by undisputed evidence that a registrant is a minister, then "there was no question as to what must be done. They must be exempted from training and service." (*Selective Service in Wartime*, Second Report of the Director of Selective Service, Government Printing Office, 1943, p. 239) The discretion of the Director of Selective Service and of the draft boards, under the Act, extends to all classifications of all persons except those who are exempt by the act of Congress. The exemption provided in the Act for ministers of religion is mandatory, and the draft boards have no authority or jurisdiction to disregard the Congressional mandate.

Throughout the history of the controversy between Jehovah's witnesses and the Government under the Act the Government has stubbornly advocated the doctrine that judicial review of a draft board determination of illegal action is confined to instances where it is satisfactorily established that there has been a denial of procedural due process of law contrary to the Fifth Amendment by the agency. This is an undue narrowing of the scope of review. Moreover it is factitious to assume, as the Government does, that *due process* is confined to *procedural* due process. If the courts can inquire as to whether there has been a violation of due process of law by an administrative agency the scope of review includes not only whether there has been a violation of procedural due process but also whether there has been a violation of substantive due process of law.

Of administrative agencies this court has said that it was not "difficult for them to observe the requirements of law in giving a hearing and receiving evidence." (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 50-52) The administrative agency "may keep within the letter of the statute prescribing forms of procedure . . . and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment." (*Chicago B. & Q. Ry. v. Chicago*, 166 U. S. 226, 234, 235) Mr. Justice Holmes, in *Buck v. Bell*, 274 U. S. 207, said: "There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law. The attack is not upon the procedure but upon the substantive law." In *Whitney v. California*, 274 U. S. 357, 373, Mr. Justice Brandeis said: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." See, also, *Adkins v. Children's Hospital*, 261 U. S. 525, 530, 531 (counsel's argument).

If Congress provides for exemption of one from duty of performing military service, and such statutory exemption is arbitrarily ignored by the draft boards, their action would be without authority or in excess of their jurisdiction. In such event it would be the duty of the court to protect the rights of the registrant, as was held by this court in *Wise v. Withers*, 3 Cranch 331, 336. In that case the Militia Act of May 8, 1792, provided for the exemption from service of federal officers. Wise claimed exemption as a federal officer because he was a justice of the peace of the District of Columbia. He refused to perform military service. The court martial imposed a penalty against him under the act by forfeiture of the title to his property.

Pursuant thereto the Collector levied upon the property. Wise brought an action in trespass on the case against the Collector, claiming that the court martial was without jurisdiction. In spite of the fact that Wise defied the law, flouted the call for duty, this court decided in his favor, holding that he was exempt from duty to perform military service. Chief Justice Marshal said:

"The law furnishing no justification for a departure from the plain and obvious import of the words, the court must, in conformity with that import, declare that a justice of the peace, within the District of Columbia, is exempt from the performance of militia duty.

"It follows, from this opinion, that a court marshal [sic] has no jurisdiction over a justice of the peace, as a militia-man; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officers are all trespassers.

"The judgment is reversed and the cause remanded for further proceedings."

In *Lehr v. United States* (139 F. 2d 919, 922) it was held that the draft boards under the 1940 Act have only authority to defer registrants. Concerning exemption of ministers of religion under the Act the court said:

"We take it that a person who is not within the age limits, or who is a female, or who is a minister, or who has been deferred expressly by the Act, is not an 'individual within the jurisdiction' of the Local Board, but whether we consider it is lack of jurisdiction or lack of legal power, the legal effect would be the same, and the courts can, and will, prohibit the usurpation of unauthorized power. . . . An able-bodied, nonministerial registrant, who is not within a class deferred by statute, cannot complain to the courts, when his number comes up in due course, because the Board did not see fit to grant him a deferment and

to send another young man in his place in order to fill its quota."

The *jurisdictional fact* doctrine is that where a statute purports to confer on an administrative agency a power to make decisions, but is construed as conferring that power only over, or with reference to, certain kinds of objects, situations or acts, then the fact-question of whether or not in any given case of such a decision the object, situation or act was, *in fact*, of the kind specified in the statute goes to the jurisdiction of the administrative agency to make the decision at all. It must therefore be determined independently in court, even though the determination of the fact in question had already been made, and was one which necessarily had to be made, by the administrative agency as an essential step in reaching its decision.

"More narrowly, on this theory, what the courts are concerned with is only whether the officer is, or is not, acting 'within his jurisdiction'. . . . In this form, the law of court review of the acts of public officers becomes simply a branch of the law of *ultra vires*." Dickinson, *Administrative Justice and the Supremacy of Law* (1927), Harvard Univ. Press, p. 41.

"On the doctrine of 'jurisdictional facts', the determination must be made over again, and independently, by the court or jury, in order to determine whether the administrative agency exceeded its competence." *Op. cit.*, p. 310.

In England the doctrine of judicial inquiry into jurisdictional fact findings of an administrative agency has been recognized. It is said that administrative "orders are, as they manifestly ought to be, liable to be challenged on the ground that they are not within the powers of the authority making them, or, in other words, that they are *ultra vires*." Hewart, *The New Despotism*, Ernest Benn, Ltd., London, p. 61.

"All prerogative legislation is in theory subject to review by the Courts of Law, and may be treated as void if found to be *ultra vires*. . . . Consequently, in order to ascertain

whether a particular statutory rule or order is *intra vires* or *ultra vires*, it is necessary to look at the terms of the authorizing statute to see whether the legislating authority has acted within the limits of its mandate, and, to speak generally, the validity of much statutory delegated legislation may be judicially challenged, and, if any such legislation is held to be invalid, it may be treated as void or quashed." *Op. cit.*, pp. 79-80.

To allow an administrative body to determine conclusively the limits of its own authority or jurisdiction is to permit it to determine a question of law which is exclusively the prerogative of the courts conferred upon them by the Constitution and which cannot be abdicated to the administrative agencies.

In *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, the statute conferred upon an official the power to kill a diseased animal. The inspector found that the horse in question was diseased. Acting pursuant to the statute, he ordered the horse killed. In that case, upon a review of the facts the court held that the horse was not in fact diseased and accordingly concluded that the administrative officer did not have jurisdiction.

In *Pearson v. Zehr*, 138 Ill. 48, a judgment against members of a board of live-stock commissioners, because of killing horses which were found not to have glanders was sustained. The court held that unless the animals were suffering from glanders as a fact, the killing was "in excess of jurisdiction" and without authority of law. The decision of such a board may be made conclusive where the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review; it cannot itself conclusively settle that question, and thus endow itself with power. . . . Clear violations of law in reaching the result reached by the board, such as acting without evidence, or making a decision contrary to all the evidence, constitute jurisdictional error and will justify reversal of the board's action." *Borgnis v. Falk*,

147 Wis. 327, 359.

The provision in the Act exempting ministers of religion is analogous to the exemption of "street, suburban or inter-urban electric" railways from the authority of the Interstate Commerce Commission under the Interstate Commerce Act. (41 Stat. 477, 49 U. S. C. Sec. 1 (22))

In *City of Yonkers v. United States*, 320 U. S. 685, 689, it was held that a determination of the Interstate Commerce Commission of a request for abandonment of the railroad line was not final and conclusive so as to preclude judicial review on whether the Commission had jurisdiction to enter the order. It was held that the exemption involved a mixed question of fact and law: "Congress has not left that question exclusively to administrative determination; it has given the courts the final say." Cf. *I. C. C. v. Inland Waterways Corporation*, 319 U. S. 671, 691.

A similar holding was also made in *United States v. Idaho*, 298 U. S. 105, 109. In that case the court said: "Appellants object that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Gagg Bros. v. United States*, 280 U. S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court; not to the final determination of either the federal or a state commission." Compare *Duquesne Warehouse Co. v. Railroad Retirement Board*, 148 F. 2d 473, 478-479.

In the administration of the public land system the courts have repeatedly allowed judicial review of determinations of the Land Department, in instances where it is claimed that the Department did not have jurisdiction because the tract in question was exempt. In *St. Louis*

Smelting & Ref'g Co. v. Kemp, 104 U. S. 636, the court said: "If they never were public property or had been previously disposed of, or if Congress had made no provision for their sale or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed."

The courts have set aside determinations of the Department where it was shown that the tract was embraced in the Spanish grant. The court held that such land was never public property and therefore not within the jurisdiction of the Department. *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 618.

The finding and order of the Land Department was held to be not final or conclusive against judicial review where by statute the land is reserved from patent. *Wilcox v. Jackson*, 13 Pet. 498; *Wisconsin, etc. R. Co. v. Forsythe*, 159 U. S. 46; *Noble v. Union R. Logging Ry.*, 147 U. S. 165; *Borax Consolidated v. Los Angeles*, 296 U. S. 10; *Morton v. Nebraska*, 21 Wall. 660.

In *Burfenning v. Chicago S. P. Ry.*, 163 U. S. 322, 323, in setting aside an order of the Land Department, this court said: "But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Crowell v. Benson*, 285 U. S. 22, 54.

In cases concerning validity of administrative orders deporting aliens, this court has repeatedly held that such agencies have no authority to deport a citizen and that the making of the claim of citizenship supported by substantial evidence thereof constitutes a denial of jurisdiction and the finding of the agency on such 'jurisdictional fact' is not binding on the court and can be determined in a judicial trial *de novo*. In an action brought under Section 9 of the Immigration Act to recover penalties (analogous to the criminal action here), this court said: "The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority." *Lloyd Sabauda v. Etling*, 287 U. S. 329. The same rule was followed in the earlier case of *Gonzales v. Williams*, 192 U. S. 1, 15.

In *Kessler v. Strecker*, 307 U. S. 22, 34-35, it was declared: "The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of jurisdiction conferred upon the Secretary." Mr. Justice Brandeis, in *Ng Fung Ho v. White*, 259 U. S. 276, at page 284, said: "The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service."

In *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 50-52, Chief Justice Hughes said: "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence

clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Where the facts are undisputed it is a question of law for the court to decide in determining whether the statute shall be applied to the undisputed evidence before the administrative agency. Determinations of a draft board involving purely questions of law, especially in reference to the extent to which the statute shall be applied, or the meaning of terms used in the statute, are for the final consideration of the courts in the exercise of the judicial function. What does or does not constitute a minister of religion within the meaning of the Selective Training and Service Act of 1940 is a judicial question which is ultimately for the courts to decide. The determination of the draft boards is not conclusive and does not preclude the courts from deciding what constitutes a minister and whether a given state of facts proves a registrant is a minister.

In *Smith v. Hitchcock*, 226 U. S. 53, the question for determination by the administrative agency was whether the publication was a book or a magazine within the terms of the statute. While the determination of whether a particular piece of literature is a book or a magazine in the ordinary sense of the words is doubtless a question of fact; yet whether it is to be classified as a book or as a magazine is a question of statutory construction. In that case the court held the question to be one of law and allowed judicial review.

In *Federal Trade Comm'n v. Gratz*, 253 U. S. 421, 427,

the court held that what constituted unfair competition methods was a judicial question on which the courts had the final say: "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include."

Whether one who is a native inhabitant of Porto Rico is a citizen of the United States is a question of law to be judicially determined by the courts in spite of the contrary administrative determination by an administrative agency. *Gonzales v. Williams*, 192 U. S. 1; cf. *United States v. Wong Kim Ark*, 169 U. S. 649.

In *Gegiow v. Uhl*, 239 U. S. 3, the immigration officials determined to exclude Russians on the ground that they were likely to become public charges because of mass unemployment at the place where they were destined. This court held that the determination of the administrative agency on such an erroneous theory was a question of law which was not binding on the courts. It was held that the aliens could not be excluded on such ground.

In *American School, etc., v. McAnnulty*, 187 U. S. 94, where on the record nothing further was shown against the complainant than that he was engaged in the business of practicing so-called "mental healing", this court reversed a decree which had denied an injunction against the issue of a fraud order, saying that whether or not mental healing was *per se* fraudulent was not a question for the Postmaster-General, and that to sustain such an order it was not sufficient to show opinions which *might* be false, but that a case of "actual fraud in fact" must be made out.

If an error of law has been committed by the administrative agency, including arbitrary and capricious determinations, the court will review the action of the administrative agency. *S. Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251.

In the case of a determination by a draft board upon undisputed evidence that a minister of religion is not

entitled to the exemption he claims, all elements of the decision can be so separated "as to identify a clear-cut mistake of law". *Dobson v. Commissioner*, 320 U. S. 489, 502. See, also, *Security Flour Mills Co. v. Commissioner*, 321 U. S. 281, 286-287.

All the latest decisions of this court clearly demonstrate that the judiciary has unquestionably retained its authority to overrule administrative determinations which are contrary to law. If a draft board commits an error of law, or makes a decision not consonant with the Act and Regulations, an error of law has been committed which requires judicial review. *NLRB v. Hearst Publications, Inc.*, 322 U. S. 114; *Norton v. Warner Co.*, 321 U. S. 565; *Equitable Life Assurance Soc'y v. Comm'r*, 321 U. S. 560; *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U. S. 194; *Thomson v. United States*, 321 U. S. 19; *Southern Steamship Co. v. NLRB*, 316 U. S. 31; *United States v. Carolina Freight Carriers Corp'n*, 315 U. S. 475.

If the draft boards are to be given exclusive and final authority of saying whether or not ministers of a certain denomination are to be given the exemption allowed by Congress, then the administrative agency is the exclusive judge of the extent of its powers and authority and is clothed with unlimited power to deny due process of law and to defy even Congress. Courts are unanimous in holding that an administrative agency does not have the power to violate the procedural rights of due process of the citizen or other person with whom they deal. Thus if an administrative agency rejects evidence, refuses to give a full and fair hearing, or in any way violates the procedural rights of a person, the courts can intervene—indeed, it is their *duty* under the Constitution to intervene—to review the administrative action. If the courts find that the requirements of procedural due process have been violated, the administrative determination is invalidated. *Bridges v. Wixon*, 65 S. Ct. 1443. Cf. *Esquire v. Walker*, — U. S. App. D. C. —, — F.2d —. So also it was held

in cases involving the determination of draft boards: *Arbitman v. Woodside* (CCA-4) 258 F. 441; *Ex parte Cohen* (DC-ED-Va) 254 F. 215; *Ex parte Beck* (DC-Mont) 254 F. 967; *Ver Mehren v. Sirmyer*, 36 F. 2d 876; *United States ex rel. Phillips v. Downer* (CCA-2) 135 F. 2d 521; *United States ex rel. Reel v. Badt* (CCA-2) 141 F. 2d 845; *United States ex rel. Beye v. Downer* (CCA-2) 143 F. 2d 125; *United States ex rel. Bayly v. Reckord* (DC-Md) 51 F. Supp. 507; *Application of Greenberg* (DC-NJ) 39 F. Supp. 13.*

The Selective Training and Service Act of 1940 provides that determinations of the draft boards subject to the right or appeal to the boards of appeal are final. (54 Stat. 893, 50 U. S. C. Sec. 310 (a) (2)) This is the usual provision limiting judicial review that is to be found in almost every act creating administrative agencies.

The Federal Trade Commission Act provides that the findings of the Commission "shall be conclusive". (52 Stat. 113, 15 U. S. C. Sec. 45 (c)) The Securities Exchange Act provides for conclusiveness of all findings of the Commission supported by evidence. (48 Stat. 901, 15 U. S. C. Sec. 78y (a)) The findings of the Federal Bureau of Internal Revenue (49 Stat. 978, 27 U. S. C. Sec. 204 (h)), the Federal Power Commission (49 Stat. 860, 16 U. S. C. Sec. 8251), the Fair Labor Standards Board (52 Stat. 1065, 29 U. S. C. Sec. 210), the Bituminous Coal Commission (50 Stat. 85, 15 U. S. C. Sec. 836 (b)), and the National Labor Relations Board (49 Stat. 453, 29 U. S. C. Sec. 160 (e).) shall be conclusive if supported by evidence.

* Here the finality provision of the Act does not prevent the court from exercising its judicial function of protecting the constitutional rights of registrants and checking the usurpation of authority by the draft boards.

* In the *Estep* case there is presented a situation where the administrative agency denied the procedural rights of due process. This denial of procedural due process, as ground for reversal of the *Estep* judgment of conviction, is thoroughly discussed under point SEVEN, *infra*, pages 194 to 202 of this brief.

In *Employers' Assurance Corp'n v. Industrial Accident Comm'n*, 170 Cal. 800, a similar statutory restraint upon judicial review of an administrative agency's determination was considered. There it is said: "Award made by the commission is subject to review and annulment where the finding on any jurisdictional fact is without the support of substantial evidence, and this notwithstanding the provision of the act that the findings of the commission on questions of fact shall be conclusive and final."

The act providing for the issuance of patents by the Land Office contains a provision making the determinations of the Land Office final. In *Johnson v. Towsley*, 13 Wall. 72, Justice Miller said: "In the use of the word 'final' we think nothing more was intended than that with the single exception of an appeal to the Secretary of the Interior the decision of the Commissioner of the General Land Office should exclude further inquiry within that department. . . . It is fully conceded that when those officers decide controverted questions of fact in the absence of fraud or imposition or mistake, their decision of those questions is final except as they may be reversed on appeal in that department; but we are not prepared to concede that when in the application of the facts as found by them, they by misconstruction of the laws take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to grant relief."

Even in the various exclusion acts allowing the immigration officers to exclude or deport aliens provision is made that the determination of the executive board shall be final. Nevertheless the courts have accorded judicial review in spite of such finality provisions. *Ng Fung Ho v. White*, 259 U. S. 276:

It is unreasonable to suppose that Congress would provide for exemption of ministers of religion and then tacitly authorize the boards to deny such exemption and thus frustrate the intent of Congress in specifically providing for the exemption.

The finality provisions of the Act here in question were intended by Congress to extend to classifications of persons not exempt. As to exempt persons it was intended to be confined to determinations where there was a disputed question of fact as to the exempt status of the registrant.

Determinations of draft boards are final only insofar as they relate to matters within the jurisdictional discretion of the Selective Service System. A recognition of the exemption of ministers of religion by the draft boards is a ministerial function exclusively and is not a discretionary function unless there is a dispute of fact or a challenge to the truthfulness of the claim for exemption as a minister made by the registrant. This conclusion is supported by the provisions of the Act that all a minister of religion is required to do is to register with the local board, making his identification as a minister known to the local board, so that the board can recognize it and eliminate the registrant from the manpower reserve. (54 Stat. 887, 50 U. S. C. Sec. 305 (d))

Since it is a judicial question to be determined as to whether the minister of a certain denomination comes within the definition of the term "minister of religion", within the meaning of the Act, the finality provisions of the Act do not foreclose review of such question of law. It would be absurd to assume that Congress intended to empower the draft boards with the right to deny a judge, a Congressman, a State governor or a member of a State legislature the deferment provided in the Act by reason of the finality provisions thereof. If the board had the power to deny a Congressman his deferment, then it would have the power to defeat the purposes of the Act in providing for statutory deferments and exemptions. The finality provisions of the Act, therefore, do not confer unlimited, imprescriptible authority upon the administrative agency.

The fact that Congress provided that the boards should have the power to decide all questions of deferment and exemption does not give them an arbitrary power—does

not empower the boards arbitrarily to usurp their functions under the Act.

For instance, a justice of the peace has the right to pass upon a plea to his jurisdiction. The fact that he may decide the plea and overrule it does not confer jurisdiction or authority upon him. If, as a matter of fact, it can be shown, in collateral proceedings, that he did not have jurisdiction, his judgment would be subject to attack in collateral proceedings to enforce it.

The Act conferred upon the determinations of the administrative agency the attribute of finality only to the extent that the powers thus conferred are exercised lawfully. An illegal and unconstitutional exercise of the power conferred by the Act cannot be shielded behind the finality provisions.

In *Trainin v. Cain* (CCA-2) 144 F. 2d 944, the finality provision of the Selective Training and Service Act of 1940 was considered by the court:

"On this appeal relator . . . presents once again the question of the extent to which courts should review the findings of selective service boards . . . [NOTE 1: Like the present Act the Selective Draft Act of 1917, 50 U. S. C. A. App. s. 204, provided that the decisions of district boards should be 'final' except for the appeal to be provided by presidential regulation.] . . . Undoubtedly the statutory provision that decisions of the selective service boards shall be 'final' narrowly limits the scope of judicial examination of board actions; but it is clear that Congress through use of such words cannot deny any registrant the constitutional protections of due process of law. See *Angelus v. Sullivan*, 2 Cir., 246 F. 54, 63 and cases cited therein. Thus it is error reviewable by the courts when it appears that the proceedings conducted by such boards have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act.' *Ibid.*, 246 F. at page 67."

There may be a need to narrow the scope of judicial review of determinations of draft boards in classifying persons not claiming the statutory exemption; that is, those liable for training and service. But as to exempt registrants there is no such need. The question of allocating manpower and filling the needs of draft quotas may be a matter within the peculiar knowledge of the Selective Service System. Certain it is that whether one should be deferred on account of employment in a defense plant, instead of being ordered to report for induction, is something peculiarly within the province of the administrative agency. It is for the Selective Service System to say the number of farmers needed to maintain a properly balanced flow of agricultural products to support the nation, including the armed forces. Also, it is exclusively the prerogative of the Selective Service System to decide how many men should be kept on the home front to maintain industry for producing implements of war. These and thousands of other matters affecting manpower, the size of the armed forces and the needs of the nation, are solely the concern of the Selective Service System. All these matters were left by the Congress within the sole discretion of the Selective Service System. They are matters that are technical.

They properly can be decided only by men skilled in knowledge of the nation's needs in wartime. The judgment of the courts cannot be rightly invoked to substitute for that of the Selective Service System in connection with all classifications that are left by Congress within the discretion of the administrative agency and which are not removed from the authority of the draft board by express exemption embodied in the Act.

However, in the case of exemption of ministers of religion no such exigencies or technical complications are involved. Congress considered all the factors and difficulties that might flow from allowing to ministers exemption from training and service when the provision for their exemption

(not deferment) was incorporated in the Act. Hence, it is not for the Selective Service System to say that the exemption shall not be allowed when rightly and not fictitiously claimed by a registrant who seeks to avail himself of the statutory provision. The mandate of Congress granting the exemption must be complied with by the administrative agency.

The authority of draft boards in dealing with the exemption of ministers of religion is *ministerial* exclusively and not discretionary in all instances where the duly asserted claim for exemption as a minister is seasonable made. It is only where there is some dispute of fact as to the claim, or an issue as to the credibility of the claim made by the registrant for exemption *as a minister*, that the draft boards have the power to exercise discretion and disallow the claim.

Creation of the Selective Service System, empowered under the 1940 Act to conscript manpower, does not show an intention of Congress that *all* questions stemming from the functioning of that created administrative agency are to be decided finally and exclusively by and within the agency. All the reasons of policy and expeditious action considered by Congress in creating the agency and in vesting with it the discretion of determining classifications affecting manpower, do not show that Congress intended to vest the final determination of the status of exempt registrants solely in the administrative agency. At least on the question of exemption of ministers of religion Congress intended that the administrative determination should not be final.

In many acts creating administrative bodies Congress has given such agencies a broad latitude in making determinations, that are unchallengeable in the courts by any person. This is ordinarily due to the fact that such agencies are created to operate in fields that are technical, requiring determinations by learned experts having peculiar knowledge of the techniques pertaining to the respective fields in which such agencies are legislatively assigned to operate.

But even in such cases questions of law and exemption provisions withdrawing certain facts from the authority of a particular agency have always permitted judicial review on such questions.

While the courts may well defer their judgment to the judgment of the draft boards in determinations affecting classification of registrants other than those exempt by express provision of Congress, yet it is clear that Congress did not intend that the determination of whether one is a minister of religion is such a technical subject that it would be left solely in the discretion of the draft boards. Experts are not necessary to determine whether one is or is not a minister. The judges of the courts have the final say on whether a person has no duty for training and service because he is a minister of religion. Members of the draft boards are no better qualified to decide whether or not a man is a minister than is a judge of a court.

It is a known fact that members of the draft boards include neighbors and friends of ordinary laymen in communities where the draft boards sit. Often they are of the "butcher, baker and candlestick-maker" variety. They are not chosen for their knowledge of Holy Writ or of religion and their skill in discerning and determining the qualifications of ministers of religion. Indeed, many members of a draft board may be neither students nor believers of the Bible or of religion. Some may have no knowledge at all on the subjects. They were chosen more for their knowledge of the qualifications, needs and effect of drafting men liable for training and service. It is in this peculiar field that this knowledge is confined. It has been well said that "the comparative obscurity of many so-called expert bodies in state and local administration may well counterbalance any argument that can be drawn from their supposed technical qualifications in favor of allowing them a wide freedom from court control. As matters stand, although these bodies are theoretically composed of experts, the facts are often otherwise. A recent enumeration men-

tions a commissioner of health in an American city who was a harnessmaker; a commissioner of public utilities who was a barber; a commissioner of sanitation who was a house-mover; and another commissioner of health who was an undertaker." Dickinson, *Administrative Justice and the Supremacy of Law* (1927), pp. 262-263:

In consideration of the scope of review to be permitted of draft-board determinations, courts that have had occasion to speak on the subject have not established a uniform rule. Indeed, there is a conflict between the various holdings of the circuit courts of appeals on this question. In *Angelus v. Sullivan* (CCA-2) 246 F. 54, the widest scope of review said to be allowed is whether the action of the draft boards "has been without or in excess of their jurisdiction, or . . . so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the Act."

In *Trainin v. Cain* (CCA-2) 144 F. 2d 944, it was said that judicial review of the classification of registrants and the determinations of draft boards is limited to "whether the local board had any evidence before it to sustain its result." Cf. *United States ex rel. Reel v. Badt* (CCA-2) 141 F. 2d 845; *United States ex rel. Phillips v. Downer* (CCA-2) 135 F. 2d 521; *United States ex rel. La Charity v. Commanding Officer* (CCA-2) 142 F. 2d 381.

Another circuit court of appeals has held that the scope of review should be limited to whether the draft boards "received and considered what a particular registrant submitted" in the form of evidence. *Stanziali v. Paullin* (CCA-3) 138 F. 2d 312. In another decision the same court said that the inquiry was limited to "whether the relator's appeal was fairly heard and determined." *United States v. Kinkead* (CCA-3) 250 F. 692. Another circuit court has reached the same conclusion. *Crutchfield v. United States* (CCA-9) 142 F. 2d 170, 173-174.

It has also been said that the only question for review by the courts of draft-board determinations is whether the

action of the board is in excess of authority and without jurisdiction; or whether the board failed to give the registrant a fair opportunity to be heard and present his evidence, assuming that the board had jurisdiction. *Franks v. Murray* (CCA-8) 248 F. 865. However, this same circuit court has also stated that review of the facts supporting draft-board determinations is confined to whether there is substantial evidence, which is the usual rule of judicial review applied to many administrative agencies. *Johnson v. United States* (CCA-8) 126 F. 2d 242; *Seele v. United States* (CCA-8) 133 F. 2d 1015, 1021; *Graf v. Mallon* (CCA-8) 138 F. 2d 230, 234-235. The same conclusion was reached by another circuit court of appeals: *Arbitman v. Woodside* (CCA-4) 258 F. 441. But see *Barley v. United States* (CCA-4) 134 F. 2d 998-999, and *Goff v. United States* (CCA-4) 135 F. 2d 610.

Another circuit court of appeals also held that the scope of review was whether there was substantial evidence to support draft-board determinations: *Rase v. United States* (CCA-6) 129 F. 2d 204, 207; *Benesch v. Underwood* (CCA-6) 132 F. 2d 430, 431. But see *Checinski v. United States* (CCA-6) 129 F. 2d 461, 462. A similar rule was stated by another circuit court of appeals: *United States v. Messersmith* (CCA-7) 138 F. 2d 599.

A more narrow rule, however, has been stated by another circuit court, that review is limited to whether there is any evidence at all to support the findings of the draft boards. *Buttcali v. United States* (CCA-5) 130 F. 2d 172.

Whatever may be the rule that is to be applied to review of determinations made by draft boards in the field of administrative deferments and in the classifications of persons not exempt, it is certain that there must be a reasonable and fair scope of judicial review allowed in reference to determinations made concerning ministers of religion exempt from duty under the Act.

To allow a draft-board order demanding a minister to

report for induction to stand on the ground that it is supported by any evidence is to defeat the purpose of Congress in allowing the exemption. If the rule denying review where there is any evidence to sustain the classification is applied, in cases involving bona fide ministers of religion, it must mean that there must be some evidence that the registrant was not a minister. If it means whether there is any evidence that he was of military age and physically acceptable, then the purpose of the exemption provided by Congress is frustrated. Indeed, a minister may be in good health and of military age. That would be some evidence to support the draft-board determination in case of a person liable for training and service. It certainly would not be any evidence to sustain the determination made by a draft board in the case of a registrant who is a minister of religion.

○ In the judicial review of determinations of draft boards involving persons claiming exemption from training and service under Section 5 (d) of the Act as ministers of religion, it must be confined to whether there was any evidence, or substantial evidence, or some evidence, that the registrant was not a minister. If there was not any evidence that he was not a minister, or if the undisputed evidence showed that he was a minister of a particular denomination, regularly performing the duties of his ministry, the draft-board determination would certainly be without support of any evidence and contrary to law. Certainly Congress did not ever intend, in the creation of an administrative agency, to force the court, in review of administrative authority, to find that the "moon is made of green cheese" because the administrative board says that it is so. *Getty v. Williams Silver Co.*, 221 N. Y. 34.

"Admittedly the only power of the boards under the statute is to pass on the question of whether a registrant is in fact a 'regular or duly ordained' minister of religion. If he is, his qualifications so to act are immaterial. *Trainin v. Cain* (CCA-2) 144 F. 2d 944.

Judicial review on some fair and honest basis must be allowed to registrants exempt under the Act, who have been wrongly classified by the draft boards, in order to give effect to the Act of Congress. Moreover, it is necessary, in order to protect the citizen from illegal usurpation of authority by the draft boards.

"Under the administrative method, government acts directly as one of the parties to the proceeding, often on its own motion. The controversy thus comes to be one, not between private individuals, but between an individual on one side and government on the other. The defendant has the mobilized force of the organized community against him. For a person in this position our traditional law has always been peculiarly sedulous. The principle has always been that the individual is entitled to the protection of the law against possible governmental aggression. And, although it is true that this principle developed when government was not yet responsible to the community and that such responsibility has been subsequently established, it is needful to remember that even a popular government must operate through fallible human agents, whose action may be arbitrary or prejudiced. The danger is especially great in the case of the petty bureaucrats who wield minor administrative authority. These persons are immune from the light of publicity which beats on the occupants of high office, and are relieved by their sheer obscurity from effective responsibility to public opinion." See Presidential Address of Charles Evans Hughes, *Rep. New York State Bar Ass'n* (1919), xlii, 234 ff.*

"The dangers of oppression by small officeholders are enhanced by another feature of the machinery of administrative justice. Not merely does the citizen find himself

* See, also, "Lawyers Urge Judicial Curbs on Administrative Abuses," Joseph W. Henderson, President, American Bar Association, *American Bar Association Journal*, March 1944, p. 122; "Making Secure the Blessings of Liberty," Annual Address by Joseph W. Henderson, President, American Bar Association, delivered on September 11, 1944, at Chicago, Illinois, *American Bar Association Journal*.

opposed by officials with the whole weight of the public force behind them, but the very officials who are his adversaries are also the judges in the cause. The health board or building inspector, or whatever body or official it may be, that acts as the adjudicating agency, is generally also the complainant in the case. However honest may be the intention of officials under such circumstances, they are humanly actuated by a desire to justify their proceedings. They are not likely to decide against themselves in a proceeding to which they are a party, or to go very deeply into the merits of a case to determine whether or not they should do so. There is an ever valid insight in Coke's dictum that the same persons ought not to be judges and parties in the same cause." Dickinson, *Administrative Justice and the Supremacy of Law* (1927), pp. 252-253.

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It was reversible error for each trial court to refuse the jury the right to inquire whether or not the action of the administrative agency in denying each petitioner his claim for exemption from training and service was in violation of the Act, the Regulations and the Constitution.

The provision for exemption of "regular or duly ordained ministers of religion" from all training and service appears in the Selective Training and Service Act. (54 Stat. 887, 50 U. S. C. App. 305 (d))

The Selective Service Regulations declare that ministers of religion shall be placed in Class IV-D. Reg. 622.44.

The Regulations define a "regular minister of religion" to be one "who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization, of which he is a member without having been formally ordained . . . ; and who is recognized by such church, sect, or organization as a minister. Reg. 622.44 (b).

A "duly ordained minister of religion" is defined to be "one who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect or religious organization, to teach and preach its doctrine and to administer its rites and ceremonies in public worship; and who customarily performs those duties." Reg. 622.44 (c).

The purpose of the absolute exemption of ministers of religion from all training and service has its genesis in the age-old policy of the government to exempt all works of piety. Charitable, religious and Christian activity has always been exempt from the ordinary burdens of government imposed on the people by law. These exemptions encourage the growth of such beneficent activities. The exemption is not a contribution to such work. It has been provided by the government on the theory of reciprocity. Advantages inure to the government from free and unhampered flow of such activities among the civilian population, especially in wartime. The uplifting influence flowing from these activities among the people contributes greatly to the welfare and life of the nation. Preaching activity of ministers of the gospel sustains the morale of the people in time of war. The sorrows and sufferings of the people as a direct consequence of war are allayed by the comforting message of hope disseminated by preachers of the gospel of God's kingdom.

Preaching activities of ministers of religion bear burdens that would ordinarily fall directly upon the government. Were it not for their eleemosynary work the general public would be required to establish welfare institutions and kindred agencies and services. Thus the government would be required to impose additional taxes and make a heavier demand upon the manpower of the nation. The Christian preaching of the gospel enjoins upon the people of good will an obligation to conduct themselves uprightly and to be obedient to all proper laws. The contribution to the government through the benefits received by the

people from the preaching activity of ministers of religion cannot be equaled by the government if it were to undertake such activity. The charitable work of ministers of the gospel "constitute not only the 'cheap defense of nations' but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure." *Trustees of First M. E. Church South v. Atlanta*, 76 Ga. 181, 192; *M. E. Church South v. Hinton*, 92 Tenn. 188, 190, 21 S. W. 321, 322; *People v. Barber*, 42 Hun (N. Y.) 27; *Comm'th v. Y. M. C. A.*, 116 Ky. 711, 76 S. W. 522.

These same arguments as grounds for exemption of the minister of religion from all training and service in the armed forces were duly considered by the House Committee on Military Affairs at hearings had upon the Burke-Wadsworth bill, H. R. 10132. (Hearings before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Session, July 30, 1940, pp. 299-305, 628-630) When the bill was before Congress, for consideration before passage, members of Congress declared that the exemption was for the purpose of maintaining the institutions of religions during the war and to insure the performance of and to guarantee that the people would receive religious training and guidance during the war. 55 Congressional Record, pp. 963, 1473, 1527.

The Director of Selective Service has said that in Congress there was "a natural repugnance toward any proposals for drafting ministers of religion for training and service." *Selective Service in Wartime*, Second Report of Director of Selective Service 1941-42, p. 239.

In speaking of this exemption in *Trainin v. Cain* (CCA-2, 1944) 144 F. 2d 944, it was said that ministers were exempted in order to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."

A review of history shows that the nations, from time immemorial, have provided for the exemption of ministers from military training and service. Before the Roman

Empire the nation of Israel conscripted men for military training and service, so that their and the people's free worship of Jehovah God would not be interrupted or affected by the nation's prosecution of war. (Numbers 1: 47-54; 2: 33) Twenty-three thousand ministers were completely exempted upon the first registration, according to statistics. (Numbers 26: 62) Under this system of exemption of ministers of religion from training and service, the effective prosecution of wars was not in the slightest impaired by reason of the large number of exemptions permitted. Indeed, that nation prospered and gained many victories. From that day, throughout history to the present day, all enlightened nations have not hesitated to liberally extend exemptions from all training and service to the ministers of religion preaching and teaching within their borders during the time of war. Only the barbarous heathen and oppressive nations have refused to allow complete exemption from military training and service to ministers of the gospel following in the footsteps of Christ Jesus.

History shows that the early Christians claimed exemption from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral as to war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.*

* Henry C. Sheldon, *History of the Christian Church*, 1894, Crowell & Co., New York, p. 179 *et seq.*; E. R. Appleton, *An Outline of Religion*, 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.*; Capes, *Roman History*, 1888, Scribner's Sons, New York, p. 113 *et seq.*; Willis Mason West, *The Ancient World*, 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.*; Capes, *The Roman Empire of the Second Century*, Scribner's Sons, New York, p. 135 *et seq.*; Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*; Hages & Moon, *Ancient and Medieval History*, 1929, The Macmillan Company, New York, p. 432; Willis Mason West and Ruth West, *The New World's Foundations in the Old*, 1929, Allyn & Bacon, New York, p. 131; Joseph Reither, *World History at a Glance*, 1942, Garden City Publishing Co., Inc., New York, p. 102; Francis S. Betten, S. J., *The Ancient World*, 1916, Allyn & Bacon, Boston, p. 541.

After the first selective service registration in October 1940 a number of misunderstandings on the part of draft boards concerning the proper classification of Jehovah's witnesses were drawn to the attention of National Headquarters of the Selective Service System. In the early part of 1941 a conference was had between the officers of that National Headquarters and a representative of Jehovah's witnesses regarding the ministerial status of Jehovah's witnesses under the Act and Regulations. Pursuant to the discussion had and the information considered, the National Director of Selective Service, on June 12, 1941, promulgated Opinion No. 14, defining the ministerial status of Jehovah's witnesses.

Jehovah's witnesses and their legal governing body, the Watchtower Bible and Tract Society, Inc., have been duly declared to be a recognized religious organization within the meaning of the Act and Regulations.

The Opinion provided:

"1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect." (Vol. III, Opinion No. 14, National Headquarters, Selective Service System)

The same Opinion provided that full-time ministers of Jehovah's witnesses representing the said Society "come within the purview of Section 5 (d) of the Selective Training and Service Act of 1940 and may be classified in Class IV-D, provided that the names of such persons appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Head-

quarters of the Selective Service System.”*

The certified list circulated by National Headquarters did not include all male pioneers, full-time ministers, because at the time of the first registration only the names of individuals between the ages of 21 and 35 were required to be submitted by National Headquarters. Shortly after the list was completed in June 1941 it was anticipated that names of other full-time ministers would be added to the certified official list. The Selective Service System promulgated a policy allowing for the addition of names to the list upon application made by the Society supported by affidavits of persons familiar with the background and activity of the person whose name was to be added to the list. Upon the February 1942 Selective Service registration a number of full-time pioneer ministers of Jehovah's witnesses were automatically added to the list because of their having been in the full-time missionary evangelistic work on June 12, 1941, when the first certified official list was promulgated. The reason their names were not on the original certified official list was because they were not of the age bracket then liable for training and service.

The method of investigating each new individual application of a new full-time pioneer to be added to the list put a heavy burden upon the limited stenographic force and personnel of the section of the National Headquarters of the Selective Service System having charge of the classification of Jehovah's witnesses. Moreover, objections were raised by some local boards that the National Headquarters was encroaching upon the original jurisdiction of the local boards in matters of classification by addition of a registrant's name to the certified list. Accordingly, on October 29, 1942, by State Director Advice No. 88, the National Director

* Part-time ministers of Jehovah's witnesses and others whose names did not appear on the certified list were eligible to make claims for exemption as ministers of religion, provided that "they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, . . . they perform functions which are normally performed by regular or duly ordained ministers of other religions." ¶ 5, Opinion No. 14, Vol. III, June 12, 1941.

of Selective Service changed the policy regarding the adding of names to the official list, and discontinued the practice of placing new names upon the certified list. On November 2, 1942, Opinion No. 14 was amended so as no longer to require that a full-time pioneer missionary evangelist of Jehovah's witnesses have his name upon such certified list. The Opinion provided: "The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion." Paragraph 5 of the Opinion reads:

"5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other [of] Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

The failure of one of Jehovah's witnesses to have his name to appear upon the certified official list circulated by the Director of Selective Service to all State headquarters in the Selective Service System does not militate against his claim for exemption as a minister of religion. It is the

duty of the draft boards to consider the facts as revealed by the registrant's file and to classify him according to the Act and Regulations. If it appears that one of Jehovah's witnesses is actually engaged in regularly preaching the gospel of God's kingdom under the direction of a recognized religious organization, the mere fact that his name does not appear on the certified official list of pioneer ministers referred to in State Director Advice No. 213-B does not authorize the board to reject his claim for exemption as a minister of religion. This is the view taken by the Government in its brief filed in *Benesch v. Underwood* (CCA-6) 132 F. 2d 430. There the Government informed the court that "the inclusion of Benesch's name on the list of 'Pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards."

In a letter from General Hershey, National Director of Selective Service, dated July 7, 1943, concerning the certified official list, he said, *inter alia*, "The official list of Jehovah's Witnesses is no more than information from National Headquarters as to those members who, within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers."

While inclusion of the name on the list may be considered by the draft boards in classifying a registrant, the absence of a person's name from the list is not made the conclusive and exclusive test. The list was established and is maintained as a convenience by the Selective Service System and the Watchtower Society in taking appeals and other administrative action. It was never considered by the Selective Service System and the Watchtower Society to exclude from consideration by boards the exemption claim

of other persons whose names did not appear on such list.

It is plain that the right of Jehovah's witnesses to classification as ministers of religion under the Act and Regulations is not confined to those whose names appear upon the certified official list circulated by the National Director to the various State Directors of the Selective Service System. Indeed, the Opinion extends to part-time ministers of Jehovah's witnesses.

On June 7, 1944, Opinion No. 14, as amended, was incorporated in State Director Advice No. 213-B, whereby the predetermination of the ministerial status of Jehovah's witnesses was treated along with that of the Salvation Army, Holy Roman Catholic Church, Church of Christ, Scientist, Jewish Congregations, and others. In that Advice the Director said, *inter alia*:

"3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work.

"4. In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status."

That part of Opinion No. 14 relative to the ministerial status of Jehovah's witnesses remains substantially the same except it was provided that "Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status"; and that "Often the servants to the brethren and the company servants are found to be devoting their lives to a work of ministry to the substantial exclusion of secular employment. In such cases, they may be considered for classification into Class IV-D as ministers of religion."*

* In State Director Advice No. 213-B as amended September 25, 1944, this latter provision was omitted and the requirement that a servant to the brethren or company servant be a full-time minister was eliminated.

The policy establishing the standards of treatment of Jehovah's witnesses by the Selective Service System has not been the same as that established for classification of members of religious organizations engaged in the same or similar work. The stringent requirements invoked for the consideration of classification of Jehovah's witnesses are relaxed or eliminated in the treatment of members of other denominations. For instance, draft boards are authorized to reject and refuse to give consideration to certificates, affidavits and statements in that part of the State Director Advice where it is said that such "are not necessarily conclusive proof of a ministerial status." In dealing with other religious organizations the draft boards are told that "no particular form of document is specified for the presentation of information concerning such status."

The Government has argued that petitioner and all other pioneers of Jehovah's witnesses are mere distributors of books. So also does the court below. (67) It is asserted that they are colporteurs and no more. They then say that by reason of this status such pioneers are not entitled to claim the benefit of the exemption contained in the Act. This is typical of all the Government's arguments. It boils down to this, that Jehovah's witnesses, although a religious organization, are not entitled to have their ministers protected by law, even though the protection is extended to the ministers of all other denominations. Indeed, the Government's argument is inconsistent with the Government's Selective Service policy with reference to other religious organizations which are engaged solely in the business of distributing books. For instance, the colporteurs of the Seventh-Day Adventist organization are not ministers in the sacerdotal sense.*

Seventh-Day Adventist colporteurs are mere "Gospel workers" whose qualifications are claimed to be equal in

*A colporteur is defined to be "one who distributes or sells religious tracts and books." Webster's *New International Dictionary*, Second Edition, page 530.

standing with those who preach the gospel. (White, The Colporteur Evangelist, Mountain View, Calif., 1930) They are not ordained as are Jehovah's witnesses. The colporteurs are not ministers as are Jehovah's witnesses. They merely sell books. They do not conduct home Bible studies. They do not make back-calls; they do not preach before congregations; they do not conduct baptismal ceremonies; they do not participate in the burial of the dead; they do not perform other ceremonies, all of which are performed by Jehovah's witnesses, as will be hereinafter shown in this argument. Nevertheless the liberal policy of the Government has been extended so as to permit these colporteurs of the Seventh-Day Adventist organization to be classified as ministers of religion exempt from all training and service under Section 5 (d) of the Act.

In allowing the colporteurs to be classified as ministers no stringent requirements are invoked for the consideration of their classification as are invoked in the consideration of the claim for exemption by Jehovah's witnesses. Compare the requirements: See State Director Advice 213-B set forth in separately-bound Appendix in this brief.*

Jehovah's witnesses are more than colporteurs. They preach and teach, in addition to merely distributing literature.

The term "regular minister of religion" as used in the Act has been given a very broad definition by the Selective Service System in so far as it applies to most religious organizations and their ministers. "The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves

* State Director Advice 213-B, in predetermining the ministerial status of these Seventh-Day Adventist colporteurs, *inter alia*, says that "even though they are not ordained" they are entitled to be classified as ministers of religion when any such colporteur is "found to be actually engaged in a *bona fide* manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials."

exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's Witnesses, who sell their religious books, and thus extend the Word. It includes lay brothers in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion." *Selective Service in Wartime, Second Report of the Director of Selective Service 1941-42*, Government Printing Office, 1943; p. 241.

The Director of Selective Service has not confined the preaching and teaching to oral sermons from the pulpit or platform. He says that such is not the test. "Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message 'from housetops' or write it 'upon tablets of stone.' He may give his 'sermon on the mount,' heal the eyes of the blind, write upon the sands while a Magdalene kneels; wash disciples' feet or die upon the Cross. He may carry his message with the gentleness of a Father Damien to the bedside of the leper, or hurl inkwells at the devil with all the crusading vigor of a Luther. But if in saying the word or doing the thing which gives expression to the principle of religion, he conveys to those who 'have ears to hear' and 'eyes to see', the concept of those principles, he both preaches and teaches. He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion.

"But to be a 'regular minister' of religion he must have dedicated himself to his task to the extent that his time

and energies are devoted to it to the substantial exclusion of other activities and interests." *Selective Service in War-time*, pp. 240-241.

The record shows that Jehovah's witnesses are regular and duly ordained ministers of religion engaged in preaching the gospel of God's kingdom under the direction of their legal governing body which is recognized as a religious organization.

One does not become a minister of Jehovah's witnesses upon suddenly declaring his intention to preach the gospel. He cannot abandon secular work and take up preaching as one of Jehovah's witnesses without first having received instruction and training for the ministry. He must first be a student, preparing himself for the ministry before he undertakes to act as an ordained minister of Jehovah's witnesses. His period of preparation may vary, depending upon his diligence, aptitude, concentration and previous education. Ordinarily he must attend the study classes in one of the congregational schools established and operated by Jehovah's witnesses to prepare others for the ministry. The schools operated for the purpose of preparing Jehovah's witnesses for the ministry are continuous.

Jehovah's witnesses recognize the seriousness of their covenant obligations to Jehovah to preach the gospel of God's kingdom throughout the whole world as a witness. They are conscious of the fact that the peoples of the nation are confronted with a clear, serious and immediate need of education concerning God's kingdom as a means to escape from everlasting destruction in His battle at Armageddon. They have adopted the quickest and most effective way to reach the people. This is by bringing the message to the people at their homes. They must do good unto their neighbor by sounding the warning and offering to teach and educate them on the Bible. If they fail and refuse thus to warn, teach and preach to the people, and instead keep the message to themselves, they would be guilty of a gross crime. (Ezekiel 33:6) They are obligated

to teach and preach to the people a message of hope and escape from the disaster that is about to befall the world in much the same way as Noah was obligated to teach and preach while preparing the ark. (Hebrews 11:7; Luke 17:26, 27; 2 Peter 2:4, 5) The purpose of the warning is not to threaten the people with destruction. Their desire is to lead all persons of good will to a condition where they can receive the benefits of life everlasting under a government of righteousness, ruled over by Christ Jesus, the invisible King, who will have as His princes the faithful men of old mentioned in Hebrews, chapter 11. (Isaiah 32:1) The benefits of that everlasting government to be established upon this earth will be unlimited prosperity, perfection of mind and body, everlasting life, the privilege of having a home with all material and necessary conveniences and the opportunity of filling the earth by bringing forth children who will never die. "Of the increase of his government and peace there shall be no end." (Isaiah 9:6, 7; 11:5, 9; 25:6-8; 65:2-23; Psalms 67:6, 7; 72:1, 4, 7, 8; Revelation 21:1-4) Jehovah's witnesses declare God's Word, which warns that His battle at Armageddon shall completely destroy all wicked governments and evil supporters of wicked governments off the face of the earth forever, together with their god, Satan the Devil. (Revelation 11:18; 2 Corinthians 4:4) They accept the counsel of Christ Jesus that the end of current wicked conditions on earth in Almighty God's battle at Armageddon will come about in this age and during this generation of people who now live upon earth.—Matthew 24:34.

The emergency that resulted from the total war just ended will be found to be small in comparison to the great international emergency in which all nations and peoples find themselves because of the impending battle of that great day of God Almighty at Armageddon.—Revelation 16:13-16.

Jehovah's witnesses believe that every Christian must be a preacher of righteousness. Living a moral and upright

life is not alone sufficient. More is required. Each Christian must prepare himself for the ministry and regularly preach the gospel in order to be a footstep follower of Christ Jesus. Once having made a consecration to preach the gospel of God's kingdom as a minister following in the footsteps of Christ Jesus, such minister cannot turn aside from his covenant to preach. It is written that covenant-breakers are worthy of death. Since all are "bought with a price", they cannot be the "servants of men". (1 Corinthians 6:20; 1 Timothy 4:6) They must "offer unto the Lord an offering in righteousness" (Malachi 3:3), which is their praise of Jehovah by giving testimony concerning His kingdom, which is done by preaching the gospel from house to house, publicly, and from the platform. In doing this they follow in the footsteps of Christ Jesus.

The method of preaching employed by Jehovah's witnesses is by making house-to-house calls, and regularly conducting home Bible studies, preaching on the streets, delivering public sermons, preaching in the schools and congregations of Jehovah's witnesses, and distributing literature containing explanation of Bible prophecies. In going from house to house and in preaching publicly Jehovah's witnesses are following in the footsteps of Christ Jesus. (Matthew 10:7-14; Revelation 3:20) Moreover, the first ministers of Christ Jesus went from house to house and taught publicly. The apostle Paul says: "I kept back nothing that was profitable unto you, but have shewed you, and have taught you publicly, and from house to house." (Acts 20:20) The minister of Christ Jesus is admonished to follow in His footsteps by preaching from door to door and publicly.

Jehovah's witnesses therefore employ the primitive method of preaching. It is simple.

In the Supreme Court of Australia, in the case of *Adelaide company of Jehovah's witnesses, Inc. v. The Commonwealth*, 1943, 67 C. L. R. 116; Mr. Justice Williams said that "Jehovah's witnesses is a religious sect professing

primitive Christian beliefs." Preaching is primitive when it is done like the first Christian minister who was Christ Jesus. His apostles also preached in the same primitive fashion.

More than 70,000,000 people in the United States do not belong to any religious organization. Many other millions do not attend any church, although they nominally belong to one of the religious organizations. These non-churchgoers are not heathen. The preaching activity of Jehovah's witnesses reaches not only these millions of persons who depend almost entirely upon Jehovah's witnesses to bring them spiritual food. Additionally, their preaching activity from door to door reaches millions of people who belong to religious organizations but who sigh and cry because of the abominations committed therein. (Ezekiel 9:4; Isaiah 61:1-3) Jehovah's witnesses have answered the need of these people by bringing them printed sermons at their homes, which meets their convenience. It is just as important to have primitive ministers and evangelists going from door to door to maintain the morale of these millions as it is to preserve the morale of those who attend some recognized religious organization's church services. How would these persons who do not attend any church be comforted in their sorrow and obtain spiritual sustenance unless some missionary evangelist brought it to them at their homes. Few, if any, of the orthodox religious clergy call upon the people from door to door. They have their established congregation. They expect the people to come to their church edifices to receive what instruction they have to offer. Accordingly, these millions of persons would starve for want of spiritual food were it not for Jehovah's witnesses who bring Bible instruction to them in their homes. Thus Jehovah's witnesses locate the people of good-will toward Almighty God. If they desire further aid in the study of the Bible Jehovah's witnesses establish Bible studies in their homes. In this way Jehovah's witnesses educate the people in the way of life and point them to

the avenue of escape from the greatest crisis yet known.

Jehovah's witnesses are an international group of missionary evangelists who get their name from Almighty God, whose name alone is Jehovah. (Psalm 83: 18; Isaiah 43: 10-12) Their preaching duties are to call from door to door, presenting Bible literature explaining about God's kingdom described in the Bible as the only hope of the world. The whole earth is divided into countries, each country is divided into divisions, each division and city are divided into areas, each area is assigned to one or more missionary evangelists of Jehovah's witnesses. The ones assigned to each area have a duty to preach from door to door in that area. Persons interested are called back on, for the purpose of establishing regular home Bible studies, which are conducted for a year or more. This is done in order that all such persons may get a complete understanding of the things that the Bible clearly teaches concerning God's kingdom and their relationship to Jehovah and His Kingdom by Christ Jesus.

In addition to this method of preaching Jehovah's witnesses also preach on the street corners by distributing Bible literature. They also deliver public lectures and sermons in various buildings engaged by them for that purpose. Primarily the congregations of Jehovah's witnesses are in the homes of the people. Their pulpits may well be said to be at the doorstep of the home of every person of goodwill throughout the nation.

It is not necessary to know theology, philosophy, art, science and ancient classic languages to preach the gospel. One is not required to wear a distinctive garb, live in a parsonage, ride in an expensive automobile, have a costly edifice in which to preach, and command a high salary, to qualify as a minister of Jehovah God. Jehovah's witnesses emulate their Leader, Christ Jesus, and His apostles, rather than the ancient or modern scribes and Pharisees. Instead of a program of choir and organ music followed by discourse on science and philosophy of men, Jehovah's wit-

nesses devote all their time to studying and teaching the Bible and carrying God's message to the people at their homes. They are ministers in the real and true sense and serve all the people. Paul, the apostle, said that the true minister teaches publicly and from house to house. (Acts 20: 20; Luke 22: 24-27) It is written that Christ Jesus "went around about the villages, teaching" and "preaching the gospel of the kindgom". (Mark 6: 6; Matthew 9: 35; Luke 8: 1) The apostle Peter advises each minister of Jehovah God: "For even hereunto were ye called: because Christ also suffered for us, leaving us an example, that ye should follow his steps." (1 Peter 2: 21) Jesus expressly commanded His twelve ordained ministers to go from house to house: "And as ye go, preach, saying, The kingdom of heaven is at hand." (Matthew 10: 7, 10-14) In the four Gospel accounts of the ministry of Jesus, the words "house" and "home" appear more than 130 times, and in the majority of those times it is in connection with the preaching activity of Jesus, the great Exemplar. His example of carrying the gospel message to the people at their homes and in the public ways was "true worship". He said: "But the hour cometh, and now is, when the true worshippers shall worship the Father in spirit and in truth: for the Father seeketh such to worship him. God is a Spirit: and they that worship him must worship him in spirit and in truth." (John 4: 23, 24) His apostle James further describes such worship by ministers of Almighty God at James 1: 27, "For the worship that is pure and holy before God the Father is this: to visit the fatherless and the widows in their affliction, and that one keep himself unspotted from the world." (Syriac New Testament, Murdock's Translation)

Each of Jehovah's witnesses is a minister. If he is not a preacher he is not one of Jehovah's witnesses. A person is not a minister because he claims to be such. He is one because he is in fact preaching. If a person is duly trained, prepared and ordained for the ministry, and regularly preaches, teaches, conducts Bible services and performs the

duties of his organization, then he is a minister. The work done by such a minister of Jehovah's witnesses cannot be done by a lay worker. Such work requires the training, learning, skill, which is given only to ministers, evangelists and missionaries who are footstep followers of Christ Jesus. Persons not ministers, except those preparing for the ministry, are not authorized to engage in such preaching activity. Accordingly, it cannot be said that the work is that of a lay church worker. It is exclusively evangelistic, missionary work that requires training of a minister. Can it be suggested that the apostles were mere lay workers because they went from house to house? It may be argued that they were not ministers of the gospel because they were footstep followers of Christ Jesus, employing the primitive method of preaching. The mere asking of the question resounds the answer. Of course it could not be argued that the apostles were not ministers. If they were ministers, by force of the same reason their modern-day counterparts, Jehovah's witnesses, must be considered as ministers.

It has been argued, because each one of Jehovah's witnesses is a minister, that such is unreasonable. The Government and the courts which have indulged in this argument do not make a valid parallel in comparing the making of such a claim by the orthodox churches where there are clergy and laity. Of course, for such orthodox religious organizations it would be unreasonable to say that the laity who do not preach are ministers, the same as the priest or preacher who is the shepherd of the congregation. Such form of activity and religious worship is not that of Jehovah's witnesses. The courts and the Government cannot apply the orthodox yardstick to Jehovah's witnesses. They cannot be measured by it. There is no comparison between the method employed by Jehovah's witnesses and the methods indulged in by the clergy of the orthodox religious denominations. Practices of the orthodox religious groups that are in the majority cannot be used as a gauge for considering a dissentient or altogether differ-

ently constructed organization such as Jehovah's witnesses. To use such comparison is discriminatory. It deprives Jehovah's witnesses of their right to be considered according to the peculiar circumstances relating to their organization, which is entirely different from all others.

The clergy of the orthodox religions have their church buildings and edifices. Members of their congregations come there to hear them preach. Members of the congregations are not authorized or ordained to preach. They are the flock.

Jehovah's witnesses gather at their meeting places as a conference of missionary evangelists. Each one assembled is a consecrated evangelist and missionary. All discuss in conference, at such meetings, ways and means of bettering their preaching as missionaries from door to door. Their "flock" and the members of their congregation do not ordinarily attend their meeting places. Such missionary evangelists go forth as did Christ Jesus and His apostles, from house to house and upon highways and byways and there deliver their message to the people. At such places thousands of persons receive spiritual instruction from those ministers as a result of the missionary evangelistic activity of Jehovah's witnesses.

Jehovah's witnesses are a society of missionary evangelists, ministers of religion, all of whom discharge their responsibility by preaching the gospel of God's kingdom as did Christ Jesus and the apostles. It is not unusual to hear of a society of ministers. Indeed there are such among some of the orthodox religious denominations. The Society of Jesus (Jesuits) is an illustration of a society of ministers. Each member is an ordained priest. No person can become a member of that organization without having first become a Roman Catholic priest. According to the comparison and analogy of the Government and some of the courts that have considered the question, the Jesuits could not be classified as ministers because they belong to a society or organization where all the members are ministers.

In various Catholic missionary societies, the Baptist Home Missionary Society, and other missionary societies of the orthodox religious denominations, each missionary and evangelist is a minister. No one can be a member of such missionary society unless he is a missionary evangelist. Each must be a minister. In such organizations they do not have the clergy and laity class distinction. Indeed, such missionary societies operate on the same principle as do Jehovah's witnesses. Each of such missionary evangelists goes from place to place, from house to house, in missionary fields of foreign countries, and preaches the tenets, traditions and precepts of his particular religion. Jehovah's witnesses engaged in the same sort of activity function in the same sort of way not only in foreign fields but also on the home front. Such missionary societies depend for their support and sustenance upon the people whom they serve in the homes. Their congregations are located in the homes of the people. So also are the congregations of Jehovah's witnesses located in the homes of the people.

Indeed, before modern days Christian congregations were composed entirely of ministers. The first Christian church, located at Jerusalem, was composed exclusively of the apostles and disciples. They studied under Jesus. They followed in his footsteps by preaching publicly and from house to house. Later others studied under the apostles of Jesus. At one time in Jerusalem there were five hundred Christian missionary evangelists, otherwise known as apostles and disciples. There is no record that any clergy-and-laity class distinctions were made in that congregation. Rather, each member of that group was required to participate in the missionary work by evangelizing the people from house to house, as commanded by Christ Jesus. When such early church at Jerusalem met it was as a conference of ministers to discuss ways and means of preaching. Their gatherings, like those held today by Jehovah's witnesses, were those of a congress or congregation of ministers to consider organization instructions and to dispose of inter-

ests common to all. They did not gather as a number of laymen gather in a church edifice to listen to sermons by a minister.

It is conceded that Jehovah's witnesses are a religious organization within the meaning of the Act. The Selective Service System has so found. That cannot be denied. The Government is asking the court to say that even conceding such fact, Jehovah's witnesses are not entitled to have ministers. The Government attempts to cajole the court into denying the legal rights of Jehovah's witnesses because of their dissentient, unorthodox and primitive method of preaching. While the Government's attorneys and the judges of the courts may possibly consider such primitive method of preaching as entirely unsatisfactory to their private beliefs, such is not the issue. Since Jehovah's witnesses are a recognized religious denomination, it must be admitted that they are entitled to have some ministers. It is for Jehovah's witnesses to decide who their ministers are. As long as such ministers are actually teaching and preaching according to the legal governing body of Jehovah's witnesses, it is not for the courts to say that such is an improper method of preaching. Moreover, the courts cannot say that a minister, duly recognized by his organization, is not a minister because he does not preach in the same way that the preacher serving the judges called upon to make the decision preaches. It has been seen that Jehovah's witnesses preach in the same way that the clergy preach. That is, they preach from pulpits and from platforms regularly. However, they do more than what the clergy do. In addition to pulpit preaching they engage in evangelistic work of calling from house to house. Also, they serve the people in their homes by conducting missionary home Bible studies. They perform other functions in discharge of their duties, such as conducting Memorial services, performing baptismal ceremonies, and burying the dead. In the performance of all these duties Jehovah's witnesses act as ministers. They do not work as lay workers.

There is no laity among Jehovah's witnesses. The "laity", in so far as Jehovah's witnesses are concerned, are the people of good will who are to be found in the homes.

The fact that Jehovah's witnesses come from all strata of humanity is immaterial. The best secular background of a minister of Jehovah's witnesses has nothing whatever to do with whether or not he is actually teaching and preaching as a minister of the gospel. Whether a man has previously been a carpenter or a fisherman matters not. If he has satisfactorily completed a course of study in the Bible and Bible helps prescribed by the governing body of Jehovah's witnesses and has established his qualifications, that should be sufficient and conclusive upon the executive and judicial branch of the Government. The only relevancy that a man's background may have to his qualification to act as a minister is upon the issue of whether he is fictitiously claiming to be a minister, and falsely pretends to possess the necessary qualifications.

Should Government's argument that the secular background of Jehovah's witnesses be considered as ground for denying their claim for exemption as ministers of religion, then a dangerous precedent will have been established if adopted by the courts. Indeed, Christ Jesus himself and His apostle Peter could be denied ministerial status because of their background in secular work. Christ Jesus spent several years working as a carpenter. His apostle Peter was a fisherman. Indeed, Peter pursued that avocation for years after he became an apostle of Christ Jesus, in order to support his family. Peter was a married man and had a family. The apostle Paul was a single person and had no responsibilities to support others. This enabled him to engage in the service as a minister full time. If the Government's contention is drawn to its logical conclusion, then even the vice-president, members of Congress, members of State legislatures and judges could be denied their claim for deferment under the Act, because of their background previous to their election to office.

The youthfulness of any of Jehovah's witnesses, as petitioner's when he began his ministry, does not affect his qualifications when he files his questionnaire. The history of his preaching at an early age is not unusual to true followers of Christ. His Christian parents brought him up "in the nurture and admonition of the Lord" and put him into the "temple service" or preaching at an early age, as required by Jehovah and as commanded in His statutes recorded at Deuteronomy 6:4-7. See Ephesians 6:1-4: "Children, obey your parents in the Lord: for this is right. Honour thy father and mother; which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." See also Ecclesiastes 12:1; Psalm 71:17; Genesis 18:19.

Timothy was ordained to preach as a disciple when but a small boy. (Acts 16:1-3) Paul, the apostle, wrote this "son of faith" thus: "Let no man despise thy youth; but be thou an example of the believers, in word, in conversation [conduct], in charity [love], in spirit, in faith, in purity."—1 Timothy 4:12; 2 Timothy 3:15; 1 Corinthians 4:17, *American Standard Version*.

Samuel, the prophet, was consecrated for service in the temple when very small and of tender age.—1 Samuel 1:24; 2:11, 23.

Christ Jesus, when but twelve years of age, was already about his "Father's business", discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, He said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God." (Luke 18:16; see also Matthew 18:1-6) Psalm 8:2: "Out of the mouth of babes and sucklings hast thou ordained strength"; Psalm 148:12, 13: "Both young men, and maidens; old men, and children: let them praise the name of the Lord: for his name alone is excellent; his glory is above the earth and heaven." (Proverbs 8:32)

Regardless of the age at which the petitioner began his ministry, there is nothing to show that he was disqualified to act as a minister of Almighty God at the time of his classification and, as such, was and is entitled to complete exemption.

Moreover, the fact that one may be of military age and in good health has nothing to do with his liability for training and service if the evidence shows that he is engaged in the performance of his duties as a minister of religion. Every person knows that even a peg-legged man can be a duly qualified and acting minister of religion. Therefore the physical condition of the registrant is entirely irrelevant and immaterial to the issues to be decided by this court.

The activity of Jehovah's witnesses has been considered by a number of courts. Those courts have found that the work of Jehovah's witnesses is religious within the meaning of the constitutions and statutes applicable. Moreover, it has been found that in the performance of this work Jehovah's witnesses act as missionary evangelists or ministers of religion.

In *Murdock v. Pennsylvania*, 319 U. S. 105, the court found that the "petitioners are 'Jehovah's witnesses' Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They claim to follow the example of Paul, teaching 'publicly, and from house to house.' Acts 20: 20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16: 15. . . . The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations

to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. . . . We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. . . . But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. . . . It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. . . . Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy."

In *Follett v. McCormick*, 321 U. S. 573, the court said that the appellant was one of Jehovah's witnesses "and has been certified by the Watch Tower Bible & Tract Society as 'an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus.' . . . We must accordingly accept as *bona fide* appellant's assertion that he was 'preaching the gospel' by going 'from house to house presenting the gospel of the kingdom in printed form.' Thus we have quite a different case from that of a merchant who sells books at a stand or on the road. The question is therefore a narrow one. It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional. . . . But

if this license tax would be invalid as applied to one who preaches the Gospel from the pulpit, the judgment below must be reversed. . . . He who makes a profession of evangelism is not in a less preferred position than the casual worker."

In *Commonwealth v. Akmakjian*, 316 Mass. 97, 55 N. E. 2d 6, the Massachusetts Supreme Judicial Court said: "We are of opinion that the case is largely governed in principle by *Commonwealth v. Richardson*, 313 Mass. 632, 638, in which we said, in part, that ordained ministers of Jehovah's witnesses who were going from house to house to spread the teachings of their religious faith could not be found properly to come within the category of 'peddlers or agents or canvassers,' and that it had been held in many cases [citing authorities] that ordinances regulating the conduct of such persons cannot be extended to cover the activities of ministers who go about on the streets or from house to house preaching or distributing or selling literature relating to their faith."

In *Semansky v. Stark*, 196 La. 307, 199 S. 129, the Louisiana Supreme Court found that the "plaintiff was . . . disseminating the doctrines of the religious sect of which he was a member and a minister." That Louisiana court, in reviewing its holding, in *Shreveport v. Teague* (200 La. 679, 8 S. 2d 640), said: "On the contrary, a reading of the opinion will disclose that we found that the mere fact that the plaintiff, an itinerant preacher, was selling literature fostering the doctrines he was professing, did not make him a peddler as defined by the license tax law. The same deduction is applicable to the case at bar. The fact that the relator preaches his religious views from house to house and distributes literature in support of his beliefs, for which he obtains contributions, does not render him amenable to the provisions of an ordinance which forbids the visitation (without request) in and upon private residences by solicitors, peddlers, etc., for the purpose of

soliciting orders for the sale of goods or for disposing of or peddling the same."

In *Shreveport v. Teague*, supra, the court found that Teague was "an ordained minister of a religious sect known as 'Jehovah's witnesses' and is a member of an organization called the 'Watch Tower Bible and Tract Society'.... He is admittedly an ordained minister of a religious sect, who, instead of voicing his views from a pulpit, travels as an itinerant preacher from house to house. The fact that relator, as an incident to his preachings, attempts to sell literature which is conformable with his religious beliefs does not alter the nature of his profession or make him a solicitor, hawker or itinerant merchant."

In *Thomas v. Atlanta*, 59 Ga. App. 520, 1 S. E. 2d 598, the Georgia Court of Appeals, in reversing the conviction of one of Jehovah's witnesses, said that it was not "the duty of an ordained minister of the Gospel to register his business with the City. Neither is it peddling for such minister to go into homes and play a victrola, or to preach therein or to sell or distribute literature dealing with his faith if the owner of such home does not object. The preaching and teaching of a minister of a religious sect is not such a business as may be required to register and obtain and pay for a license so to do."

In *State v. Meredith*, 197 S. C. 351, 15 S. E. 2d 678, the South Carolina Supreme Court said that Meredith was one of Jehovah's witnesses and that he was "a minister of the Gospel; and if the party solicited was interested, he offered for sale one or more of the books and pamphlets referred to. . . . The testimony shows that the main and primary purpose and occupation of the defendant was to preach and teach principles drawn from the Bible, in accordance with his faith, wherever one or two were gathered together and would listen to him. . . . And in our opinion it is not peddling, as that word is usually construed, nor a violation of the statute, for a minister, under the circumstances shown here, to visit the homes of the people, absent objection,

and as a part of his preaching and teaching to offer to sell or sell religious literature explanatory of his faith, where no profit motive is involved."

The United States District Court for the District of Colorado, in *Donley v. Colorado Springs* (40 F. Supp. 15), in granting an injunction held that Jehovah's witnesses were entitled to relief, *inter alia*, because "the plaintiff, a minister of the Gospel, is not within the definition of the ordinance."

The Government may argue that these findings and holdings of these courts are not controlling in determining here whether Jehovah's witnesses are ministers of religion. To accept such an argument would be to split hairs and render a distinction without a difference. The activity of Jehovah's witnesses described in those opinions was the basis for the conclusion in such decisions that Jehovah's witnesses were ordained or regular ministers of the Gospel. The precise activity is under review here. The similar conclusion, that Jehovah's witnesses are ministers of religion here, should be unescapable.

Several courts have had occasion to pass upon the question of whether Jehovah's witnesses constitute ministers of religion within the meaning of Section 5 (d) of the Act. In so far as the particular witness of Jehovah making the claims in decided cases is concerned, the courts have ruled that such registrants did not come within the exemption of Section 5 (d) of the Act and Regulations thereunder.*

However, in these decisions certain derogatory remarks are made concerning Jehovah's witnesses, which

* *United States v. Messersmith* (CCA-7) 138 F. 2d 599; *Rase v. United States* (CCA-6) 129 F. 2d 204; *Buttecali v. United States* (CCA-5) 130 F. 2d 172; *United States ex rel. Altieri v. Flint* (D. C. Conn.) 54 F. S. 889, affirmed 142 F. 2d 62 (CCA 2); *Ex parte Stewart* (D. C. Cal.) 47 F. S. 415; *Ex parte Yost*, (D. C. Cal.) 55 F. S. 768; *United States ex rel. Lawrence v. Commanding Officer* (D. C. Neb.) 58 F. S. 933; *Seele v. United States*, (CCA 8) 133 F. 2d 1015.

clearly indicate that these courts considering the activity of Jehovah's witnesses have judged their claim for exemption by comparing the activity to the preaching done by the clergy of the orthodox religious organizations. These courts have erred in viewing the activity of Jehovah's witnesses through the eyes of the orthodox clergy. If the courts, in deciding these cases, had looked at Jehovah's witnesses and their activity through the clear, uncolored glasses of the law, they would have seen that Jehovah's witnesses are preaching the gospel as much as, if not more than, are the clergy of the orthodox denominations and are entitled to the same consideration at the hands of the Selective Service System.

These courts have judged Jehovah's witnesses according to the standards of the orthodox religious denominations that have rigid creeds, ecclesiastical laws and traditional canons. These courts should not have compared the record made in these cases with the background of the personal religious experience of the judges of the courts that made the activity of Jehovah's witnesses appear exotic. If the courts had employed a realistic approach they would have been driven to the conclusion that Jehovah's witnesses constitute a religious denomination and that their ministers are actually preaching, and thus come within the exemption intended by Congress to extend to all religious organizations.

Moreover, these courts, in the decisions rendered where these erroneous conclusions were reached, considered only tangentially the question of whether Jehovah's witnesses were entitled to claim the exemption. Most of those decisions did not require the court to pass upon the merit of the claim made before the draft boards by Jehovah's witnesses. In most of said opinions the courts decided the appeals in the criminal cases adversely to Jehovah's witnesses, holding that they were not entitled to challenge the legality of the classification given them because they had not exhausted their administrative remedies by report-

ing for induction. Accordingly, the discussion in those opinions, as to whether Jehovah's witnesses are ministers under the Act and Regulations, was wholly unnecessary to the decision made in each of those cases. Such discussions were *dicta*.

The exemptions provided for in the constitutions and the various statutes considered by the courts in the foregoing opinions were given a liberal interpretation. The words and spirit of Section 5 (d) of the Act require that they, too, should be given a liberal interpretation, so as to bring Jehovah's witnesses within the exemption provided for in the Act.

There is nothing in the Act to show that Congress intended to not permit as broad a construction to be placed upon the exemption in the Act as has been placed on the 'freedom of religion' clause of the Constitution. Reason and fairness would dictate that if Jehovah's witnesses are preaching as ministers of religion so as to entitle them to the protection of the First Amendment, by force of the same reasoning they are ministers of religion preaching the gospel and thus entitled to the exemption provided for in Section 5 (d) of the Act.

The only court that has directly considered the issue of whether a full-time pioneer missionary evangelist of Jehovah's witnesses is entitled to the exemption as a minister of religion provided for in the Act is the United States District Court for the Northern District of Indiana. That court, in *Hull v. Stalter*, 61 F. Supp. 732 (decided February 9, 1945), found that the undisputed evidence showed that the petitioner was engaged in preaching the gospel full time as a pioneer missionary evangelist of Jehovah's witnesses. The court declared that the action of the board in rejecting Hull's claim was illegal. The court said: "Applying the test, which I believe is required, to the case at hand and in the light of the foregoing observations, it is my conclusion that there was no evidence before the Draft Board (that is, neither the Local nor the Appeal

Board) on which to deny the petitioner's claim that he be given a IV-D classification."

Jehovah's witnesses have been ordained as ministers to preach the gospel. The ordination is in accordance with the regulations of the legal governing body of Jehovah's witnesses. They are ordained; therefore ordained ministers of religion within the meaning of the Act and Regulations. The Selective Service Regulations declare that one who has been ordained according to the practice of a recognized religious organization "to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs these duties" is a duly ordained minister of religion within the meaning of Section 5 (d) of the Act. Reg. 622.44 (c).

The Director of Selective Service has declared that while ordination in many of the large orthodox denominations is accompanied by elaborate ceremonies, in many other organizations, including the dissentients and unorthodox groups "it is the simplest of ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme." *Selective Service in Wartime*, Second Report of the Director of Selective Service 1941-42, p. 240.

It has been held that the term "ordained minister", as used in the statute licensing ministers to solemnize marriage ceremonies, "has no regard to any particular form of administering the rite or any special form of ceremony. . . . It has been the practice of this court, therefore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who are engaged under such authority in ministering in religious affairs; to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the court that they have been duly appointed or recognized in the manner required by the regulations of their

respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies." *In re Reinhart*, 9 Ohio Dec. 441, 445.

The word "ordain" (*ordained*) means "to establish by appointment", "to appoint or establish." Webster's *New International Dictionary*; Funk & Wagnalls *Practical Standard Dictionary*.

The Encyclopedia Americana (1942 Ed., Vol. 20, p. 770) defines ordination as "The ceremony by which priests, deacons, subdeacons, candidates for the minor orders and ministers of any denomination are admitted to their specific office in the church." See also *The Encyclopædia Britannica* (11th Ed., Vol. 28, p. 527 *et seq.*).

*The Cyclopædia of Biblical, Theological and Ecclesiastical Literature** defines ordination as "the ceremony by which an individual is set apart to an order or office of the Christian ministry. . . . In a broader, and in fact its only important sense, . . . the appointment or designation of a person to a ministerial office, whether with or without attendant ceremonies. The term ordination is derived directly from the Latin *ordinatio*, signifying, with reference to things or affairs, a setting in order, an establishment, an edict, and with reference to men, an appointment to office. . . . A scriptural investigation of this subject can hardly fail to impress any ingenuous mind with the great significance of the fact that neither the Lord Jesus Christ nor any of his disciples gave specific commands or declaration in reference to ordination."

The system of ordination, according to the doctrine of apostolic succession, was practiced by the Roman Catholic Hierarchy from about the tenth century. It was fully restated by the *Council of Trent* as well as in the formularies of the Roman pontifical, the characteristics of which are: (1) that clerical orders constitute a sacrament; (2) that

*Vol. VII, p. 411 (McClintock and Strong, 1877, Harper & Brothers, New York).

seven clerical orders (exclusive of seven grades of bishops, of which the pope is supreme) are those of priest, deacon, subdeacon, acolyth; exorcist, reader, and porter; (3) that bishops only are competent to confer ordination; (4) that the effect of ordination is to impress on the recipient an indelible mark; (5) that the priest has authority to offer sacrifice for living and dead. In passing, it must be noticed that the Roman Catholic Hierarchy ordains its ministers several times. An individual is ordained when he becomes a priest and each time he is elevated to a higher office, such as bishop, archbishop and cardinal. *Op. cit.*; see *Encyclopedia Americana*, 1942 Ed., Vol. 2, p. 70; *The Catholic Encyclopedia* (1911, Robert Appleton Company, New York) Vol. 11, p. 279 *et seq.*

The above stated theory of ordination had universal prevalence throughout "Christendom" from the sixth to the sixteenth century. A prominent factor of the Reformation was a violent reaction against the dogmas and abuses of the Roman Catholic *system* of ordination. Without exception Protestants rejected the "five sacraments" of the Roman Catholic Church as fictitious. Almost all such churches forsook those ordination *ceremonies* during the Reformation and fell back on the Scriptural precedent as their sole guide for modes of appointing and ordaining ministers.*

Among the independents and Baptists the power of ordination is considered to adhere to any given congregation of believers. The qualifications of a candidate are first ascertained and he is approved by a church, called and accepted. The congregation proceeds to confer ordination upon him by prayer. *Op. cit.*, p. 417.

This same broad and liberal interpretation of the term "ordained minister" as it relates to exemption of a minister

* McClintock and Strong, *Cyclopedia of Biblical, Theological and Ecclesiastical Literature*, Vol. VII, p. 417: "A partial exception has to be stated in reference to the Church of England, which retained a portion of the Roman ritual of ordination." The Director of Selective Service does not consider that ordination direct from God is sufficient to base decisive action. *Selective Service in Wartime*, p. 240.

of a religious denomination under the National Selective Service Mobilization Regulations of Canada has been considered by Mr. Justice McLean of the Supreme Court of Saskatchewan in the case of *Bien v. Cooke*, 1944 1 W. W. R. 237. In that case he said: "Although the whole congregation is very indefinite considered from a secular point of view and they appear to be without any prescribed procedure in the matter of ordaining the minister, yet various denominations use various forms of ordination and if the procedure is satisfactory to the congregation, as appears to be in this instance, that should be considered sufficient form of ordination."

With the exception of the Roman Catholic Church and the Church of England, the term "ordained minister" means an *appointed minister* and is not confined to any particular kind of ceremony or formalism. Many groups, such as the Society of Friends, Disciples of Christ, Plymouth Brethren and Jehovah's witnesses do not recognize any human right of ordination. They recognize the ordination as coming only from Almighty God Jehovah. This may be recognized and certified by men. Man-made institutions and legal corporations that act as governing bodies of such may declare one to be duly ordained, and issue credentials of authority or ordination. The ordination proceeds only from Jehovah God and His Son, Christ Jesus.

Compare the history of the method of ordination in the following churches: Baptist, Congregationalist, Methodist, Disciples of Christ, Society of Friends (Quakers), Lutheran, Presbyterian.*

* Sanford, *A Concise Cyclopedia of Religious Knowledge*, 1895, Funk and Wagnalls Co., New York, pp. 81 et seq.; 207 et seq.; 254 et seq.; 348 et seq.; 545 et seq.; 593 et seq.; 682 et seq.; 756 et seq.; Simpson, *Cyclopedia of Methodism*, 1876, Louis H. Everts, Philadelphia, p. 681 et seq.; *The Catholic Encyclopedia*, Vol. 10, p. 237 et seq. This vast difference in ceremonies of ordination is recognized as existing today by the Director. No set form of ceremony has been established by the Selective Service System. The Director says: "The determinations of this status by the Selective Service System have been generous in the extreme." *Selective Service in Wartime*, supra.

The ordination of Jehovah's witnesses emanates from the Most High God "whose name alone is Jehovah". (Psalm 83:18; Isaiah 61:1-3) He is the Source of all power and authority and the One who authorizes ordination of His ministers. The ceremony used by Jehovah's witnesses to establish by public witness the ordination of a minister is identical with the ceremony that Christ Jesus underwent after He was ordained. A very simple ceremony marked the beginning of His ministry. He symbolized His consecration by undergoing the ceremony of water baptism in the river Jordan. (Matthew 3:13-17) It is this same simple ceremony that every one of Jehovah's witnesses goes through as a public symbolizing of his consecration to preach and of his ordination. No other ceremony is prescribed. After His ordination ceremony by baptism in the river Jordan, Christ Jesus publicly stated the Source of His ordination by quoting from Isaiah 61:1, 2. He said: "The Spirit of the Lord is upon me, because he hath anointed me to preach the gospel to the poor; he hath sent me to heal the brokenhearted, to preach deliverance to the captives, and recovering of sight to the blind, to set at liberty them that are bruised, to preach the acceptable year of the Lord. . . . This day is this scripture fulfilled in your ears."—Luke 4:18-21.

Jehovah's witnesses likewise rely upon Isaiah 61:1, 2 as an expression of the Source of their authority and ordination. In addition to the baptismal ceremony, which is evidence of the heavenly ordination, Jehovah's witnesses also possess credentials of ordination issued by the Watchtower Bible and Tract Society, certifying that they are ordained

ministers of the gospel. This certificate is printed.* It is the method used and accepted by Jehovah's witnesses to evidence their ordination. The card is signed by the Watchtower Bible and Tract Society acting through its president. It is also countersigned by the minister. In addition to that certificate of ordination, full-time missionary evangelists are issued a letter of ordination by the Watchtower Bible and Tract Society, subscribed by the superintendent of evangelists before a notary public, certifying that such pioneer minister is a duly authorized minister of the gospel and authorized to represent the society as such.

It is not necessary for one to go to an orthodox religious seminary or parochial school as a condition precedent to becoming an ordained minister of the gospel. Christ Jesus did not go to such institution. He had been brought up in the "nurture and admonition of the Lord" (Ephesians 6:4) by his parents, who instructed him. He prepared himself for the ministry by continual study of the written Word of God and training while he was carpentering. So, too, today the ministers of Jehovah's witnesses prepare themselves by home Bible study and through instructions received at the divinity schools conducted by Jehovah's witnesses in connection with the congregations, where Jehovah's witnesses and students preparing themselves for the ministry attend regularly.

* Pertinent parts of the certificate are as follows: "This is to certify that _____ whose signature appears below, is an ordained minister of Jehovah God to preach the gospel of God's kingdom under Christ Jesus and that said person is one of Jehovah's witnesses. . . . Jehovah's witnesses are ordained and commissioned by God, and the signer of this card Scripturally claims such ordination and commission, as set forth in the Bible at Isaiah 61: 1, 2; Isaiah 43: 9-12; Matthew 10: 7-12; Matthew 24: 14; Acts 20: 20; 1 Peter 2: 21; 1 Corinthians 9: 16. . . . Jehovah's witnesses, in obedience to God's commandments, preach the gospel and worship Almighty God by calling upon people at their homes, exhibiting to them the message of the gospel of said Kingdom in printed form. . . . The Society of its appointed representatives will be pleased to furnish authoritative proof as to whether the signer of this card is one of Jehovah's witnesses.

WATCH TOWER BIBLE & TRACT SOCIETY
By N. H. Knorr, President"

The submission to the ordination ceremony of public immersion in water brands the minister of Jehovah's witnesses. It marks him as a person who has dedicated his entire life to the service of Jehovah God as a minister, bound to preach the gospel of God's kingdom as long as he lives prior to Armageddon. His ordination implies the acceptance of the obligations which it imposes. A complete, unbreakable agreement on the part of the minister thus ordained, to follow in the footsteps of Christ Jesus, is entered into. The one ordained cannot turn aside from his covenant to preach, for any reason. The covenant requires faithful preaching, even to the point of death. An ordained minister of Jehovah God cannot turn back without violating his covenant. The turning back from preaching will result in his everlasting death, because God declares that covenant-breakers are worthy of death.—Acts 3: 23; Romans 1: 31, 32.

A pioneer, as that term is used by Jehovah's witnesses, means a minister who devotes substantially his full time to the preaching of the gospel as a missionary evangelist. Each pioneer, full-time missionary evangelist, in order to devote his full time to the substantial exclusion of other activities, is required to strive for a quota of 150 hours of actual house-to-house and public preaching as a missionary evangelist.*

Becoming a pioneer does not mean that such person thereby becomes a minister. Before becoming a full-time missionary evangelist the pioneer has been ordinarily engaged in part-time preaching of the gospel for a considerable period. The ordinary pioneer has been ordained long prior to his entry into the full-time missionary evangelistic

* A special pioneer is required to devote 175 hours per month to actual door-to-door missionary preaching. (1945 *Yearbook of Jehovah's witnesses*, p. 60) They averaged during the year 1944 165.9 hours per month. (*Ibid.* p. 59) See also 1944 *Yearbook of Jehovah's witnesses*, pp. 57-60. A general pioneer has set for him a quota of 150 hours per month to actual house-to-house missionary evangelistic work. (1945 *Yearbook of Jehovah's witnesses*, p. 60) The average hours devoted to the missionary work was 130.2. (*Ibid.* p. 62) See also 1944 *Yearbook of Jehovah's witnesses*, pp. 60-62.

work. His taking on the full-time missionary evangelistic work as a pioneer merely means that he has assumed a higher status in the organization. It merely signifies that he devotes all of his time to preaching instead of part of his time. He thereby has heavier duties and greater responsibilities. He acts as a direct representative of the legal governing body of Jehovah's witnesses. He is subject to assignment to do missionary work in communities that are well populated as well as those sparsely populated. He may be required to do missionary work in communities where there are none of Jehovah's witnesses. He may be required to act as an itinerant evangelist, moving from place to place.

While no particular worldly education or a degree from a theological school is required as a condition precedent to the enrollment of a minister in the full-time pioneer missionary evangelistic work, there are certain requirements that must be complied with. The minister desiring to enter the full-time missionary work as a pioneer must satisfactorily establish that he possesses the necessary qualifications. He must show that he has a thorough knowledge of the Bible and is apt to teach and preach. He must have studied thoroughly the publications of the Watchtower Bible and Tract Society explaining the doctrines and teachings of the Bible as viewed by Jehovah's witnesses. Ordinarily it will be found that a pioneer has regularly attended, for a satisfactory period of time, one of the ministry schools conducted by Jehovah's witnesses.*

It has ever been the policy of the legal governing body of Jehovah's witnesses, *The Watchtower Society*, to use its journals and other publications as a means to encourage part-time ministers to join the full-time pioneer missionary evangelistic work. Also each year special letters have been written from the headquarters to all of Jehovah's witnesses everywhere, encouraging them to become pioneers in the missionary field. These campaigns to increase the full-time evangelistic force of Jehovah's witnesses have been carried

* See APPENDIX, pp. 58a-61a.

on annually and for many years before the Selective Training and Service Act of 1940 was passed. On other occasions in this court and in the circuit courts of appeals where the Government has opposed Jehovah's witnesses the Government has called attention to the efforts of the Society, acting as the governing body of Jehovah's witnesses, to increase the number of pioneers since beginning of the war. In such instances the Government makes no reference to the same efforts of the years previous to the Selective Training and Service Act. The Government usually makes reference to the 1942 *Yearbook of Jehovah's witnesses*, where it is said, *inter alia*, that: "During the year a series of special letters were sent to all companies, calling attention to the wonderful privilege of service set before them in the full-time work. The response to the call to pioneer service was excellent. . . . By the end of the year a grand total of 2,093 new pioneers had been enrolled. In closing the records of the Society at the end of the year it was found that there are 5,463 actually enrolled in full-time service." (P. 46) The Government has argued that the letters written by the Society were to encourage men to join the full-time missionary work to escape their duty under the draft act. Nothing could be farther from the truth, as is abundantly attested by the letters * themselves

* These letters mentioned in this *Yearbook* as being the ones that unduly encouraged the pioneer ranks are handed up to the court for examination. Consideration of these letters shows that they are the same type of letters that had been written in previous years to pioneers. They are ordinary appeals to joining the pioneer ranks, without any reference to the Selective Training and Service Act or the war. A reading of the various yearbooks for each year will show that similar appeals were made. Some appeals resulted in large increases. Others did not. See the *Yearbook of Jehovah's witnesses* for each year hereinafter listed, to wit, 1940 at page 58; 1939 at page 59; 1937 at page 65; 1936 at page 53; 1935 at page 41; 1934 at page 43; 1933 at page 50; 1932 at page 56; 1931 at page 67; 1930 at page 56; 1929 at pages 55-56. In the 1929 *Yearbook of Jehovah's witnesses* just referred to it shows that as a result of the campaign for new full-time publishers 1000 new pioneers were enrolled that year.

that were referred to in the 1942 *Yearbook* as written to Jehovah's witnesses. Also reference is made to the 1943 *Yearbook of Jehovah's witnesses* where it is said that a convention was held in September, 1942; and that, "The call went forth for 10,000 pioneers in the United States by next April; and, from the way the brethren have applied for pioneer service since this convention, it appears very likely that we shall have 10,000 in the United States. Within four weeks after the convention ended 600 new applications for pioneer service had been received at this office." (P. 67)

Every one of Jehovah's witnesses desires ultimately to devote his entire time and life to preaching the gospel. This they consider to be the primary obligation of their lives. It means preaching until death or until Jehovah's battle at Armageddon. Jehovah's witnesses and their legal governing body know that the "harvest is plenteous, but the labourers are few; pray ye therefore the Lord of the harvest, that he will send forth labourers into his harvest." (Matthew 9:37, 38) This command for gaining for the work more ministers to assist in preaching the gospel in all the world and unto every creature is applicable in wartime as well as in peacetime. By each one devoting more time to preaching he is 'provoking willing hearers to love and good works, . . . exhorting, and so much more' as the day approaches. (Hebrews 10:24-25) Because Jehovah's witnesses have carried on the same campaign to increase their ranks in wartime as they have in peacetime is no ground for arguing, as has the Government, that Jehovah's witnesses are unduly taking advantage of the draft law to increase their numbers. The statistics do not prove that the argument of the Government is correct.

There has not been an extraordinary increase in the number of pioneers from Jehovah's witnesses since the first registration under the Selective Training and Service Act. Since 1941 the annual increase of Jehovah's witnesses, full-time pioneers and company publishers (part-time ministers), has been natural and not out of proportion to the

increase of previous years. The records of the number of full-time and part-time ministers of Jehovah's witnesses appearing in the *Yearbooks* of Jehovah's witnesses have been considered. These annual records show a proportionate increase yearly in full-time pioneer ministers and part-time ministers, company publishers. They are set forth below and compared with the number of persons attending conventions of Jehovah's witnesses in the same years.*

The proportionate number of Jehovah's witnesses, full-time and part-time missionary evangelists, compared to the total population of the country, is approximately the same as the proportion of Catholic priests to the population. Priests of the Roman Catholic Hierarchy number approximately 36,000. They serve approximately 22,000,000 Catholics. The total number of Jehovah's witnesses is 61,172. (1945 *Yearbook of Jehovah's witnesses*, page 56) They serve 70,000,000 nonchurch members and an untold number of millions of members of religious organizations. The total number of full-time missionary evangelists was 5,046, or an average of one pioneer to each 26,000 persons in the United States. Whereas, compare this with the fact that there is one Roman Catholic priest to every 3,611.

The term "company publisher" as used by Jehovah's witnesses describes the part-time missionary evangelist. Throughout all history there have been part-time ministers.

* YEAR	PIONEERS	COMPANY PUBLISHERS	CONVENTION ATTENDANCE	YEARBOOK
1932	1,997			1933 p. 50
1933	1,976	16,058		1934 p. 43
1934	1,976	18,967	15,000	1935 pp. 41, 48-49
1935	1,829	20,786	20,000	1936 pp. 53, 55
1936	1,831	21,415	25,000	1937 pp. 68-69, 75
1937	1,838	21,689	30,000	1938 p. 56
1938	1,910	25,596	65,000	1939 pp. 59, 74
1939	2,176	35,466	75,000	1940 pp. 56, 69
1940	2,686	47,762	79,335	1941 pp. 71, 90
1941	4,049	56,745	115,000	1942 pp. 42, 59
1942	5,290	62,179	129,699	1943 pp. 39-40, 68
1943	6,278	62,762	167,000	1944 pp. 56, 57, 85
1944	5,046	61,172	140,700	1945 pp. 56, 58, 60, 83

Indeed, the early history of the recognized orthodox non-Catholic organizations in this country shows such were served almost exclusively by part-time ministers. Some organizations today do not have a paid clergy. Thousands of orthodox churches, especially in rural communities, depend entirely for the services of a minister upon ministers who perform their services gratuitously. All of these ministers depend almost entirely for their support and maintenance upon secular jobs performed by them during the week.*

The facts show that the ordinary part-time missionary evangelist of Jehovah's witnesses, known as company publishers, devotes more hours to actual preaching and teaching as a minister than do the orthodox clergy. The orthodox clergyman preaches a sermon once or twice a week and makes a few visits upon the poor and needy, and the rest of the time is ordinarily at his own disposal. The time during the week, when the orthodox minister is not regularly engaged in preaching, the company publishers of Jehovah's witnesses are earning a livelihood at various secular jobs. However, they regularly preach the gospel of God's kingdom. They function, therefore, as regular ministers of religion, within the meaning of the Act.

The provisions for the exemption of ministers of religion appearing in the Act and Regulations should be given a liberal construction and interpretation, in order to include the regular and duly ordained ministers of every recognized religious organization. As has been seen, the exemption is for the benefit of the nation and the people as a whole. Therefore, a construction should be placed on the Act and Regulations which is in keeping with the spirit

*"3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some *religious organizations* ["churches" appears here instead of "religious organizations" in unamended original] both practice and necessity require the minister to support himself, either partially or wholly, by secular work."—State Director Advice No. 213-B as amended September 25, 1944, National Headquarters, Selective Service System.

of the institutions of this country built for the purpose of preserving freedom of worship and encouraging it. The courts uniformly held that a broad and liberal interpretation should be placed upon the provisions of the various State constitutions exempting from taxation property of religious organizations used for religious purposes. (*Trustees of Griswold College v. State*, 46 Iowa 275; *Watterson v. Halliday*, 77 Ohio St. 150, 82 N. E. 962; *Matter v. Canevin*, 213 Pa. 588, 63 Atl. 131; *Congregational Society of Town of Poultney v. Ashley*, 10 Vt. 241, 244. Cf. *Shaarai Berocho v. New York*, 60 N. Y. Super. Ct. 479, 18 N. Y. S. 792.) For the same reason expressed in these decisions a similar generous and broad construction should be placed upon the provision for exemption provided in the Selective Training and Service Act. The extension of the benefits of the exemption provided for in the Act and Regulations is made without regard to the popularity or unpopularity of the various religious organizations in the country. It has never been the policy of the law to choose between religious organizations or to discriminate between orthodox and unorthodox organizations.

Webster's *New International Dictionary* defines a "minister" to be "one authorized or licensed to conduct Christian worship".

"The phrase 'minister of religion' is wide enough to embrace any evangelical office, and has about it more of the savor of humility than 'pastor'." *Encyclopædia Britannica* (13th ed.) Vol. 18, p. 542.

"Minister" or "minister of the gospel" is a comprehensive term, and of uncertain significance. Ministers are spoken of as public teachers of piety, religion and morality. (New Hampshire Constitution, Art. 6) They are sometimes called "ministers of the gospel" and sometimes "ordained ministers of the gospel", a term less comprehensive in its significance. *Kidder v. French*, N. H., Smith, 155, 156.

A statute pertaining to authority to perform marriages by clergymen includes ministers of every denomination and

faith. *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209, 211.

"Ministers" as used in a tax exemption statute includes a person elected by a Methodist society to be one of their local preachers, and ordained as a deacon of the Methodist Episcopal Church though he had no authority to administer the sacrament of the communion. *Baldwin v. McClinch*, 1 Me. (1 Greene) 102, 107.

"Minister of religion" as used here provides that every minister of religion, authorized to preach according to the rules of his church and regularly employed in the discharge of his ministerial duties, shall be exempt from military service, etc., includes a minister who belonged to a religious sect who performed ministerial labor gratuitously, and who resorted to secular employment as a means of subsisting himself and his family. If "regularly employed" as a minister, the fact that in the interval between appointments he pursued some other avocation, which did not according to the rules of his church disqualify him for the sacred function of the ministry, cannot take his exemption from him. *Ex parte Cain*, 39 Ala. 440, 441.

Since the very beginning of this nation the country has been a haven for dissentient religious groups. Persecuted ministers of various religious denominations have fled from all other countries under the sun to this nation. Dissentient groups and organizations have sprung up by scores during the last 150 years. Schisms from orthodox and unorthodox denominations have multiplied by the thousands. According to federal census reports, in 1936 in the United States there were 256 religious bodies with 199,302 different religious organizations in addition to Jehovah's witnesses. *The World Almanac 1945* (New York World-Telegram) p. 365. The Director of Selective Service has declared that an extremely liberal interpretation must be placed upon the Act and Regulations providing for the exemption. (*Selective Service in Wartime*, p. 241) He has given a liberal effect to the Regulations by providing for exemption of the lay brothers of the Roman Catholic Church. "It

appears that Catholic Brothers have made profession of the vows required of them by their respective religious Congregations, such as poverty, chastity, obedience, and are said to devote all of their time to their congregations. Moreover, when the Selective Training and Service Act was being discussed in Congress, it was made clear that it was intended that the Brothers were included in the purview of the statutory exemption from training and service of regular ministers of religion. It is believed that they are and should be considered 'regular ministers of religion.' (State Director Advice 213-B as amended September 25, 1944, National Headquarters, Selective Service System.) His opinion declares that these men, who number many thousands in the United States, shall be completely exempt and entitled to the IV-D classification allowed ministers of religion. These men are not priests, nor in line for the priesthood, of the Roman Catholic Hierarchy, but do menial work in the religious institutions of the Hierarchy. They do not conduct religious services of any kind and many are declared to be uneducated and "unable to attain to the degree of learning requisite for Holy orders" but "able to contribute by their toil" and "able to perform domestic services or to follow agricultural pursuits". See *The Catholic Encyclopedia*, Vol. 9, p. 93.

Due to the fact that there are nearly three hundred different religious groups in the country, and thousands upon thousands of various religious organizations, including orthodox and unorthodox, it must be assumed that Congress intended to make provision for every *bona fide* minister of religion of every religious organization. This is the only conclusion that can be reached in order to be consonant with sound law. It cannot be said that because Jehovah's witnesses are not in favor with the religious and political powers that he, as a matter of law the exemption provided for in the Act and Regulations does not apply to them.

In providing for exemption Congress contemplated that

persons devoting their lives to spiritual affairs as ministers are doing something for the benefit of the public, necessitating their exemption from training and service, regardless of whether the minister performing such service is representing a popular or unpopular, orthodox or unorthodox, organization. It is necessary to provide a very broad interpretation upon the exemption provision appearing in the Act and Regulations, so as to include any group, organization or society. If a broad interpretation is not placed upon the exemption, then opportunity is presented for discrimination. The records of history show that religious differences and the difficulty of reconciling the views of another on religious subjects has provided the greatest field of prejudice and religious discrimination. Members of draft boards are not impervious to the prevalence of this prejudice.

The provision for the exemption of ministers of religion from training and service in the armed forces of other nations has been given a very liberal interpretation. The English Court of Appeal held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord v. Hiscock*, 86 L. J. K. B. 941) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the Justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Saskatchewan held that a registrant was entitled to exemption from all

training and service as a minister of religion. (*Bien v. Cooke*, 1944, 1 W. W. R. 237) There the minister spent six days a week farming. No special educational requirements were necessary. All that was required was that he satisfy the general secretary, who was a railroad engineer, that he believed the New Testament, and that he met the necessary moral requirements.

In *Ex parte Cain* (39 Ala. 440, 441) the Alabama Supreme Court considered the provision for the exemption of ministers of religion from all training and service under the conscription act of the Confederacy during the Civil War. In that case Cain performed his ministerial duties once a week gratuitously. During the remaining six days of the week he engaged in secular employment as a means of supporting himself and his family. It was held that he was a regular minister of religion under the act because he regularly preached once each week. The court held that as a minister of religion he was exempt from all training and service.

The federal judiciary should be entirely neutral with respect to religious persuasions and beliefs. All organizations, regardless of their orthodoxy or unorthodoxy, should be entitled to the same privileges and rights under the law. The law and the courts are no respecters of persons or religious organizations. Religious groups and their respective ministers are not required to measure up to some orthodox yardstick. A realistic approach to the construction of an act providing for benefits to religious organizations requires that the federal courts make "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton v. Howe*, 31 Beavin 14). The theory of treating all religious organizations on the same basis before the law is well stated by the court in *Watson v. Jones*, 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any

religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided in Section 5 (d) of the Act for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

Daniel Webster, in his memorable argument in the *Girard Will* case, said, *inter alia*, that "all proclaim that Christianity, general tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and fagot are unknown, general tolerant Christianity, is the law of the land." (Works of Daniel Webster, Vol. 6, p. 176; 10 Mich. L. Rev. 176) "The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity; and we cannot be imbued with them and yet prevent them from entering into and influencing, more or less, all our social institutions, customs and relations, as well as our individual modes of thinking and acting. It is involved in our social nature that even those among us who reject Christianity, cannot possibly get clear of its influence, or reject those sentiments, customs and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life." *Mohney v. Cook*, 26 Pa. 342, 347.

Mr. Justice Brewer in *Holy Trinity Church v. United States*, 143 U. S. 457, said that this country was a Christian nation. See his opinion at page 471.

In view of these laudable expressions of the Christian policy of the nation it must be assumed that Congress in

providing for the exemption of ministers of religion did not intend to mean only some ministers of some organizations. Therefore, a construction must be placed upon the Act to include all ministers of all religious organizations whose lives are devoted to the performance of their duties as ministers. The true test in every case is whether or not one is devoting his life in the service of his organization as a minister, whether as an ordained minister of religion or a regular minister of religion.

In determining whether or not a minister of a religious organization is entitled to the exemption under the Act the court cannot apply the orthodox yardstick. Moreover, the courts cannot substitute their private opinion as to whether a person claiming exemption is entitled to the exemption on the basis of whether he performs the same duties as do the clergy of the orthodox religious denominations. The courts cannot employ the methods and activity of the recognized orthodox religious denominations as a guide for determining whether the ministers of Jehovah's witnesses, a dissentient and unorthodox group, are entitled to the exemption. It was the intention of Congress to make provision for the protection of the worship of little people by exempting ministers of all organizations, whether large or small, rich or poor, popular or unpopular, orthodox or unorthodox.

If the provisions for the exemption of ministers of religion in the Act and Regulations are given a construction so as to exclude Jehovah's witnesses, then an unreasonable construction is placed upon the Act and Regulations. Such an interpretation would result in discrimination.

"It is not for a court upon some *a priori* basis to disqualify certain beliefs as incapable of being religious in character. . . . It should not be forgotten that such a provision as Section 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities,

and in particular of unpopular minorities." *Adelaide [Australia] company of Jehovah's witnesses, Inc. v. The Commonwealth*, 1943, 67 C. L. R. 116, 128.

The courts are not authorized to proceed to judge the qualifications of a minister of a religious organization on the basis of the personal views of the judges of the court. Mr. Justice Galanders of the Ontario Court of Appeal, in *Donald v. Board of Education*, 1945, O. W. N. 526, said: "It would be misleading to proceed on any personal view on what such exercise might include or exclude." If courts were permitted to judge according to their personal knowledge what constitute duties of a minister of a religious organization, based on the experience had and knowledge obtained from association with ministers of popular orthodox denominations, the law would change with the complexion of every judge. In that event every time there should occur a change in the personnel of the court that would give rise to a change in the law. If it is permissible for the judges of a court to decide that a minister, duly appointed according to the custom of his faith and regularly serving as a minister, is not entitled to the exemption provided for in the Act because the activity of the minister is not performed in a way with which the judges are personally familiar and approve of a proper preaching—if this form of judicial determination were permitted in arriving at the construction to be placed upon the Act and Regulations, a Catholic judge could decide that a Presbyterian minister is not a minister under the Act and Regulations, and the Baptist judge could decide that a Catholic priest is not a minister of religion within the law. The illustrations could be increased *ad infinitum*. Under such process, instead of being governed by law, the people would be governed by men. The exemptions in the Act and Regulations would operate according to the swing of the pendulum of decisions as the religious complexion of the court changed with the appointment of judges.

It has been judicially declared that were "the adminis-

tration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern v. Lutheran Churches*, 1 Sandf. Ch. 439, 507 (N. Y.)) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker as all, possessing equal rights." (*Donahue v. Richards*, 38 Me. 379, 409; Cf. *People v. Board of Education*, 245 Ill. 334, 349; *Grimes v. Harmon*, 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshipping the Supreme Being." (*State ex rel. Freeman v. Scheve*, 65 Neb. 853, 879) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People v. Steele*, 2 Barb. 397) "So far as religion is concerned the laissez faire theory of government has been given the widest possible scope." (*State ex rel. Freeman v. Scheve*, 65 Neb. 853, 878, 93 N. W. 169)

Neither Shakers nor Universalists will be discriminated against in distributing the avails of land granted by Congress in 1778 for "religious purposes." (*State v. Trustees of Township*, 2 Ohio 108; *State v. Trustees*, Wright 560 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether their adherents to his mind smack of fanaticism or not; he has no right to act upon such

individual opinion in administering justice. (*People v. Pillow*, 3 N. Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence v. Fletcher*, 49 Mass. 153; *Gass v. Wilhite*, 32 Ky. (2 Dana) 170). In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine was contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison v. Brophy*, 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church v. Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); *Andrew v. New York Bible and Prayer Book Society*, 6 N. Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law of the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. (*Waite v. Merrill*, 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245).

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities." *Minersville v. Gobitis*, 310 U. S. 586.

"No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion and unconventional ways is still far from secure. Theirs is a militant and

unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, 'Jehovah's Witnesses Mold Constitutional Law,' 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." *Prince v. Commonwealth*, 321 U. S. 158.

It has been argued that draft boards and courts can exercise their ordinary, common knowledge obtained through human experience in rejecting the claim of Jehovah's witnesses. Of course in answer thereto petitioner does not argue that the judge should not exercise common sense and knowledge of the law. What the Government attempts to cajole the court into holding is that the draft boards and other personnel of the Selective Service System that have to do with the claims for exemption can reject the claim of Jehovah's witnesses on the ground that their experience with orthodox religions, when compared to the activity of Jehovah's witnesses, does not permit the claim that they are ministers within the meaning of the Act. In other words, the Government wants the boards and the courts to judge Jehovah's witnesses according to the practices of orthodox religious clergymen in the popular religious denominations. The Government desires to have the court restrict the exemption and it is desired that the exemption be confined to ministers having congregations. The Government desires to have the board and the courts to hold that unless the witness of Jehovah in making the claim for exemption showed that he stands in relation toward organizations of their denominations, such witness would not be entitled to claim the exemption. In making this argument the Government urges the court to place a discriminatory construction upon the Act, which is unreasonable. The Government desires that the members of

the draft boards and the judges of the courts adopt the standards of the orthodox religions, of which they have knowledge by reason of human experience, and thus reject the valid, *bona fide* claims for exemption made by Jehovah's witnesses, because they do not practice and preach the same way that the orthodox clergy do. Such argument is wholly inadmissible.

The Government argues that the activity of Jehovah's witnesses and their claim for exemption as ministers of religion are contrary to the experience of human knowledge. "I find difficulty in understanding what is meant by the expression 'contrary to the principles of human knowledge'. If what is meant is, 'contrary to what is generally accepted as true', I know of no reason in law or morals that forbids the propagation of views which are opposed to what is generally accepted as true. To deny the right to do this presupposes the infallibility of human judgment, and would bar the way of progress in every direction scientific and otherwise." Chief Justice Meredith of the Ontario Court of Appeal, *In re Orr*, 1917 40 O. L. R. 567, 592.

The doctrines advocated by Jehovah's witnesses and their method of preaching them may appear strange to the judges of the court. But the court should not be astute to determine whether or not a religious organization is running its affairs according to recognized standards. The court should allow a religious organization extreme liberality and wide latitude as to the mode in which its governing body may think it best to carry out the purposes of the organization. If Jehovah's witnesses decide that it is more proper to preach from house to house than from a pulpit; if Jehovah's witnesses decide that it is more proper to ordain by water immersion than by elaborate religious ceremony; if Jehovah's witnesses decide that no one will be permitted to act as one of Jehovah's witnesses unless he is a minister, instead of having a clergy and laity class; and if Jehovah's witnesses decide that it is better to have printed credentials of ordination rather than an elaborate

certificate issued by a theological seminary, then such judgments and choices of the legal governing body of Jehovah's witnesses should be accepted by the court as binding upon the court in so far as the propriety of the preaching by Jehovah's witnesses is concerned. It is not for the court to say that this is not the businesslike and proper way of doing things. Indeed, it is the duty of the court to recognize and give effect to the decisions of the legal governing body of Jehovah's witnesses as to the appointment and proper conduct of the organization's ministers.

When a court undertakes to say what proper form of ordination, teaching and preaching as used by any religious organization is improper, then the court is going beyond the scope of its authority. Under such circumstances the court would be setting itself up as a super-governing body of religious organizations. Certainly it is not competent for a court to invade the field of worship by denying exemption on the ground that the activity is not carried on according to orthodox experiences. If the courts were permitted to decide on such a basis, the courts would be illegally usurping power of telling the religious organizations how to run their spiritual affairs. If Jehovah's witnesses are in agreement as to the method that they have chosen to preach the gospel and it does not involve a violation of the laws of morality and an invasion of the rights of property, it is not for the courts to say, because of the failure of the judges to understand their method of operation, that they are not entitled to the exemption. If the mode of activity is acceptable to Jehovah's witnesses, then the inability of the judges of the court to agree with them as to the propriety of such method of preaching is wholly irrelevant. It is of no moment that members of the court would believe that it is theologically inapt to preach the gospel in the manner as do Jehovah's witnesses, having in mind the methods of the orthodox churches to which some members of the court may belong.

In the case of *Ex parte Cain*, 39 Ala. 440, in determining

whether or not the part-time minister attempted to be drafted under the conscription act of the Confederacy during the Civil War was entitled to exemption, the Alabama Supreme Court aptly states the limitation of the judiciary in passing upon matters spiritual in so far as they pertain to the activity of a minister claiming exemption, saying: "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Mr. Cain belonged to a sect of religionists, who perform ministerial labor gratuitously."

In the decision styled *In re Reinhart* (9 Ohio Dec. 441, 445) the court said: "The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations, much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as 'the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican and Greek churches; consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers.'"

It cannot be argued that Congress intended to discriminate between ministers of any religious organization. It is highly improper and asking that an unreasonable construction be placed upon the Act to impute to Congress the intention of saying that only some ministers of religion shall be exempt from training and service. Congress did not intend to forge an instrument that may be used to oppress ministers of unpopular and unorthodox religious organizations.

If the argument of the Government that the draft boards can decide the claim for exemption by ministers under the Act according to their own private personal experience, then there would be not a case standing in the entire record of the Selective Service System where any unorthodox or dissentient minister received the exemption. In a Catholic territory the Protestant ministers would be denied exemption. In a Protestant community the Catholic priests would be denied exemption. Thus, even the most orthodox denominations would be in jeopardy in many communities and the executive department, acting through the administrative agency, would be repealing the Act of Congress that provides for the exemption. The Selective Service System would be entirely free to ignore the law.

If the specious, unsubstantial arguments of the Government made against Jehovah's witnesses are adopted by the court, then no religious organization in the land can depend on the exemption provisions of the Act. If the administrative agency can decide that the exemption is to be applied only to some ministers of some denominations, and that other ministers are excluded from the provision, then the very purposes of Congress have been defeated.

Moreover, the Government advocates that the draft boards have the right to ignore the undisputed evidence in arriving at classifications. Indeed, the Government argues that the Selective Service System can reject unimpeached written statements and affidavits of persons acquainted with Jehovah's witnesses who make claims for exemption as ministers of religion before draft boards, and render decisions directly contrary to the unimpeached record.

This argument for the undue assumption of power by the draft boards, if adopted by the courts, would give them greater powers than any other agency ever created by law. Even judges and juries do not have the right to reject

* "Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status." State Director Advice 213-B, as amended September 25, 1944, National Headquarters, Selective Service System. A

undisputed evidence. To reject undisputed evidence is a violation of the right of due process. A decision by the draft board in the teeth of the evidence is dishonest. A dishonest decision is arbitrary and capricious. An arbitrary and capricious decision, contrary to the evidence, is unlawful and void. *Johnson v. United States* (CCA-8) 126 F. 2d 242, 247. "If it flies in the teeth of the facts which are before it, then its action is arbitrary and the registrant has not been afforded due process of law." *SWYGERT, J., Hull v. Stalter*, 61 F. Supp. 732.

If the draft boards are allowed to arrogate to themselves such extraordinary power, then no person would ever be able to establish any claim contrary to the whims and caprices of the members of the draft boards and the Selective Service System. Even a judge who claimed deferment under the Act could be denied his claim for deferment from military training and service because the boards would have the authority to reject his written evidence proving his status as a judge of a court of record. If arbitrary and capricious draft boards have this power, then indeed they have been authorized by Congress to repeal the parts of the Act allowing deferment to members of Congress, members of State legislatures and the Governors of the various states.

It seems only reasonable to conclude that no draft board has the power to arbitrarily and capriciously reject undisputed written evidence and render a decision contrary thereto. Especially is this true in the cases where the written evidence submitted to the board is undisputed. The power of the draft boards to reject written proof is confined only to instances where it can be established that the evidence is unreliable, false, discredited or impeached.

Determination of draft boards contrary to the undisputed evidence must be supported by some evidence. If a determination is made upon some grounds contrary to evidence received, the Regulations provide that the evidence relied upon by the board should be reduced to writing and

placed in the registrant's file. (Reg. 627.13⁸ (b)) This is absolutely necessary in order to preserve due process and the rights of the registrant upon appeal. Moreover, it is imperative that the draft boards make a record of the evidence they rely upon that does not appear in the file, in order that the board of appeal can properly perform its function in reviewing the determination upon appeal. How can a board of appeal properly pass upon the validity of a classification unless it has advantage of the same evidence that a draft board has? The board of appeal considers only that which is reduced to writing. (Regs. 615.43, 627.13) It is mandatory that the boards reduce the evidence to writing in order that the file forwarded to the board of appeal, which classifies the registrant *de novo*, may be complete. (Regs. 615.43, 627.13) Congress did not intend to give unlimited power to a draft board nor authorize it to reject undisputed evidence and arbitrarily and capriciously classify the registrant according to rumors, hearsay and other incompetent evidence.

SIX

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely Smith's right to have the jury pass upon the issue of the validity of his defense.

The court below held that "there was nothing offered to show that in any of the proceedings defendant was denied any constitutional right. . . . That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right." (63)

The entire draft board file of petitioner was offered in evidence. It was excluded by the court and marked for identification. (8) This was defendant's exhibit A for iden-

tification. It showed that petitioner had been brought up by his mother as one of Jehovah's witnesses. It also revealed that petitioner attended college at the instance of his father, who was not one of Jehovah's witnesses. His mother desired him to become a full-time pioneer missionary evangelist of Jehovah's witnesses; his father did not. While attending college, he actually devoted more than sixty hours per month to house-to-house preaching. Prior to May 1943, he occupied a position with the local congregation of Jehovah's witnesses as assistant to the presiding minister. He regularly performed ministerial duties in spite of his college curriculum. In May, 1943, he applied for service as full-time pioneer missionary evangelist. On June 1, 1943, he began work as a full-time missionary evangelist.

The appeal board gave him his final classification on June 13, 1943. Under the Act and Regulations, Smith was entitled to have his ministerial status determined as of the date of his final classification. *Application of Greenberg*, 39 F. Supp. 13. In *Hull v. Stalter*, 61 F. Supp. 732 (DC-Ind.) decided February 9, 1945, the Government conceded in oral argument that the registrant was entitled to be classified upon the records made in his case as of the date of the final classification.

At the time petitioner was classified on June 17, 1943, he was engaged in the full-time pioneer missionary evangelistic work. However, the undisputed evidence in his file showed that he had been regularly performing duties as a minister of the gospel for several years prior to the filing of his questionnaire. Moreover, it showed that he was an ordained minister of the gospel and of Jehovah's witnesses at the time he filed his questionnaire with the local board. Although he may have been attending college at the time he registered, he had discontinued attendance at college before June 17, 1943, when he was classified by the appeal board, at which time he was engaged in the full-time pioneer missionary evangelistic work.

Assuming that his case is to be decided as of April

1943, the time he was classified by the local board, it still would not be harmless error to exclude the evidence. The undisputed evidence showed that he was an ordained minister of religion at the time the local board classified him. If there was any issue of fact before the board as to whether or not he was claiming classification as a minister of religion in good faith, it was a matter for the jury to finally decide in defense to the indictment. The circuit court of appeals and this court cannot assume that petitioner falsified his claim or that the undisputed evidence showed that he was not claiming classification as a minister in good faith.

The defense of whether or not petitioner was a minister of religion should have been submitted to the jury for determination. In a criminal prosecution it is beyond the power of the district court or the circuit court of appeals to hold that a defendant does not have a right to have the issue of his guilt submitted to the jury. If the undisputed evidence did not show that he was not guilty, then there was an issue of fact raised as to his guilt. The failure of the trial court and of the circuit court of appeals to hold that petitioner was entitled to have this issue submitted to the jury violated his constitutional right of trial by jury. *United States v. Taylor*, 11 F. 470, 471; *Cain v. United States*, 19 F. 2d 472; *Blair v. United States*, 241 F. 217, cert. den. 244 U. S. 655; *United States v. Stevenson*, 215 U. S. 190, 199; *Patton v. United States*, 281 U. S. 276.

The attendance of the petitioner at college, while regularly pursuing his ministerial activities, does not, as a matter of law, withdraw from the consideration of the jury whether or not he was exempt as a minister of religion. "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister." (*Trainin v. Cain*, CCA-2, 144 F. 2d 944) See also *Ex parte Stewart*, (DC-Calif.) 47 F. Supp. 415, 420. In the cases

of *Ex parte Cain*, 39 Ala. 440-441, *Offord v. Hiscock*, 86 L. J. K. B. 941, and *Bien v. Cooke* (1944) 1 W. W. R. 237, each of the persons claiming exemption from military training and service was employed in secular work during the week and preached once a week as a minister of religion on Sundays. Each of those decisions held that particular determinations by the administrative tribunals were arbitrary, capricious and illegal because denying the claim for exemption on the ground that they were engaged in secular work. Regardless of whether this court holds as a matter of law that one is a minister who performs secular work during the week and engages in ministerial work regularly on Sundays and at other times during each week, the court cannot hold as a matter of law in the face of these decisions and the liberal interpretation placed upon the Act that one who does perform secular work to sustain himself in the ministry is not a minister of religion within the meaning of the Act. This being true, it is an issue for the jury or at least for the trial court. The trial court did not perform its judicial function on the question. The petitioner did not have a judicial trial before the trial judge on the issue of whether or not he was exempt. Indeed the trial court excluded all the evidence and refused to pass on the question. It is improper for an appellate court to approve such illegal procedure on the part of the trial court because the appellate court is of the opinion that the draft board was not arbitrary and capricious in making its determination. It was the duty of the trial court to first pass on this question in order that it could be properly reviewed in the appellate court. Not having been passed on either by the trial court or the jury it is fundamental and reversible error to withhold the issue from the jury regardless of what the circuit court of appeals thought about the matter of the merit of petitioner's claim for exemption.

Petitioner has been seeking a judicial trial on this issue but has not yet received it. The judgments of the courts below should not be affirmed on the ground of harmless

error. If this doctrine of the circuit court of appeals is affirmed then all manner of errors committed by the trial courts in excluding evidence in criminal cases can be whitewashed on the ground that the circuit court of appeals was of the opinion that the evidence was unbelievable. The exercise of the judicial function by the circuit court of appeals is no excuse for the unconstitutional refusal of the district court to exercise its judicial powers in reviewing the evidence.

SEVEN

Estep's procedural rights to due process of law were violated by his local board withholding evidence from the board of appeal, preventing it from properly determining his rights under the Act and Regulations, contrary to the Fifth Amendment to the United States Constitution.

The Regulations require that the local board place in the registrant's file all papers submitted by him pertaining to his occupational status and classification. Section 615.43 (a) provides, *inter alia*, "Every paper pertaining to the registrant except his Registration Card (Form 1) shall be filed in his Cover Sheet (Form 53)." The excluded evidence showed that the local board failed to place in the registrant's file vital evidence submitted by Estep pertaining to his status under the Act.

After Estep had taken his appeal and before his file was forwarded to the board of appeal he offered to the local board additional evidence in writing. The board refused to receive that evidence, the clerk falsely informing him that his file had been forwarded to the board of appeal. In May 1944, having learned that the board had not forwarded his file to the board of appeal, Estep procured additional evidence in writing, which was mailed, together with affidavits tendered in 1942, to the local board for placing in his file.

The local board, although Estep's papers were received by it before his file was forwarded to the board of appeal, did not place that documentary evidence in Estep's cover sheet as required by the Regulations. The board of appeal did not see or consider all that additional documentary evidence. It did not know of the action of the local board in withholding the documents. Estep's classification was affirmed solely because of the local board's failure to include the documents in his cover sheet. The classification of Estep would have been different and he would probably have been declared exempt from all training and service by the board of appeal had the local board complied with the Regulations and included those papers in the file.

Inasmuch as no classification is permanent (Reg. 626.1) it was the duty of the local board to receive additional evidence pertaining to Estep's status during the eighteen months following his classification, which was submitted before the file was forwarded to the board of appeal. Section 626.2 of the Regulations provides that the local board may reopen and consider anew a registrant's classification upon written request presenting facts in writing not considered when the registrant was classified, "which, if true, would justify a change in the registrant's classification."

It was the duty of the local board, upon its refusal to reopen and reconsider Estep's classification as requested by him, to notify him that the documentary evidence did not "warrant the reopening of the registrant's classification" and to "place a copy of the letter in the registrant's file." (Reg. 626.3) This regulation required the local board to place in Estep's file the documentary evidence received by it even though the board refused to reopen his classification.

Moreover, it was the duty of the local board under other regulations to receive the documentary evidence and place it in Estep's file, irrespective of the regulation pertaining to reopening of a registrant's classification. Section 627.12 of the Regulations provides that the registrant may make a written appeal statement specifying the particulars in

which the board erred and in addition thereto may submit in writing any information offered to the local board "which the local board failed or refused to include in the registrant's file."

Regardless of whether Estep was entitled to have the documentary evidence placed in the file on the ground that it was submitted for the purpose of reopening his classification, or for the purpose of constituting a written statement upon appeal and additional documentary evidence supporting same, it was the duty of the local board to place the papers in Estep's cover sheet and forward them to the board of appeal. Section 627.13 of the Regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete."

There is no time limit in Regulation 627.12 as to when the "statement" or the "information which was offered" and which the board "refused to include in the registrant's file" must be submitted by the registrant. The only reasonable limitation as to time of filing should be that the documents ought to be submitted to the local board before the cover sheet is forwarded to the board of appeal. For instance, if a registrant went to his board in the morning to sign his appeal he would no doubt have the right to go back to the board on the afternoon of the same day and file his appeal statement or information not received by the board, provided the file had not been sent to the board of appeal.

By force of reason he could return on the next day, or during the next week, or the next month or even the next year to file these documents as long as his Cover Sheet was still with the local board and had not been forwarded to the board of appeal. Particularly is this true when the local board had not finished with his classification on account of not having ordered him to take a physical examination, as in this case. There is no question that when Estep offered the evidence to the board in 1944 some of the documents had been rejected by the board in 1942.

Therefore under the Regulations he had the right to offer that as evidence which the board had refused him the right to file. Nor is section 627.12 confined to evidence offered at a personal appearance. It is broad and unlimited and covers any evidence which may have been offered to the local board at any time before the file is sent to the board of appeal. If this construction is not placed on this regulation then it would be possible for the local board to usurp its prerogative under Part 626 which provides for submission of additional evidence upon reconsideration.

Thus if a local board rejected evidence offered on reconsideration the board of appeal, which considers classifications *de novo*, would be deprived of its right to correct errors committed by the local board under the regulations because the local board would have the unlimited power to withhold and keep from the board of appeal any evidence offered under section 626. (The new evidence offered in 1944, not submitted in 1942, was receivable under Section 626.) It seems to be inexorable that the local board must include in the registrant's file any additional evidence offered at any time before the file is forwarded to the board of appeal. This is especially true because the board of appeal makes all its determinations *de novo*. It should be the sole prerogative of the board of appeal to determine whether or not the additional evidence shall or shall not be incorporated in the file. At least the board of appeal should have the right to consider under Part 626 and Section 627.12.

It may be argued by the Government that *Cramer v. France* (CCA-9) 148 F. 2d 801, 804, and *United States ex rel. La Charity v. Commanding Officer* (CCA-2) 142 F. 2d 381, 382, are in point. These decisions held that a registrant did not have the right to reopen his case as a matter of right, and that the refusal of the administrative agency to reopen the classification was not ground for invalidating the subsequent orders commanding the registrants to perform military service. In neither of those cases was it

shown that the local board failed to comply with regulations prescribing the procedure for reopening and reconsidering a classification. Indeed, in those cases the local boards received the evidence, placed it in the registrants' files and notified them of the refusal to reopen the classification. In each of those cases the board of appeal had opportunity to review and consider the evidence submitted on the request for reopening of the classification. In both of those cases the administrative agency accorded the registrants their rights of procedural due process. Inasmuch as the board of appeal did not have opportunity to review the illegal action of the local board by reason of its purloining the documents submitted by Estep, there was a rank denial of the right of procedural due process which distinguishes the *Estep* case from the *Cramer* and *La Charity* cases, *supra*.

Since the board of appeal must consider the registrant's classification *de novo* it cannot be said that Sections 626 and 627 are for the exclusive use and sole benefit of the local board. The board of appeal had a duty to perform under these regulations. It had the right to consider evidence submitted by Estep under these regulations. The duty and right of the board of appeal to perform its function in reviewing Estep's case were frustrated by the illegal action of the local board.

Since the board of appeal has the final say as to the classification to be accorded a registrant, it must be assumed that the authors of the Act and Regulations intended that the local board, in all cases where appeals were taken by registrants, should perform a duty in behalf of the board of appeal very much like a master, referee or notary public taking a deposition. It is the function of the local board to gather all the evidence for consideration by the board of appeal, which passes on all questions involved. If it were otherwise, so that the board could withhold evidence from the registrant's file forwarded to the board of appeal, the local board would have unlimited powers and arbitrary

discretion to determine just what evidence the board of appeal should or should not consider under Sections 626 and 627 of the Regulations. Thus the authority of the board of appeal could be circumscribed and its power sapped by whimsical actions of the local board.

It is submitted that the action of the local board was a violation of the Regulations which could not be cured by the classification of Estep by the board of appeal unless the board of appeal had the opportunity to pass upon the action of the local board in excluding the evidence. Since the board of appeal knew nothing of the illegal action of the local board it was impossible for it to take action to correct the usurpation of power by the local board.

Furthermore, the alleged ambiguity of the Regulations cannot be used to justify the action of the local board. Even in absence of any regulations as to the right to file additional evidence the registrant would have the right, under the circumstances of this case, to submit additional evidence in view of the long lapse of time from the date of classification to the date of sending the papers to the board of appeal. Indeed, the due process clause of the Fifth Amendment requires such a conclusion and compels a construction to be placed upon the Regulations similar to that adopted by the Selective Service System in the *Rinko* case, because the action of the board of appeal is *de novo*. *United States v. Pitt* (CCA-3) 144 F. 2d 169.

"There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored." CARDOZO, J., *Ohio Bell Telephone Co. v. Public U. Comm'n*, 301 U. S. 292, 304. See, also, *Shields v. Utah-Idaho Central Ry.*, 305 U. S. 177, 182.

"Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is

manifest that the hearing has not been given." *Morgan v. United States*, 298 U. S. 468, 479-481.

In *Kwock Jan Fat v. White*, 253 U. S. 454, the administrative agency omitted and suppressed testimony of important witnesses favorable to the applicant. On appeal to the Commissioner of Immigration the administrative determination was affirmed. In spite of the fact that Congress had given great power to the Secretary of Labor in the exclusion of Chinese immigrants, the court said:

"It is a power to be administered not arbitrarily and secretly, but fairly and openly under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts in proceedings for review to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information not less of the Commissioner of Immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural-born citizen of the United States should be permanently excluded from his country."

The duplicity and chicanery of the local board, in withholding the vast amount of evidence submitted by Estep as to his ministerial activity, are emphasized by its action on the request of the Pennsylvania State Headquarters of Selective Service System. That office asked the local board to provide additional information as to Estep's ministerial activity as late as 1944, following the decision by the board of appeal. Instead of sending all the voluminous evidence offered by Estep in May 1944, which was then in possession of the local board, the local board obtained a very inadequately short statement from Estep. It was forwarded to that office by the local board which continued to withhold the elaborate documentary evidence

submitted by Estep. (226-227) The construction placed upon the Regulations by Estep, that he was entitled to submit additional evidence, was adopted by the local board when, following his appeal, it placed in his file a prejudicial anonymous letter to which was attached a newspaper clipping concerning the sentence imposed upon Nick Falbo. (218-219) *Falbo v. United States*, 320 U. S. 549.¹

The irregularity of the local board in handling Estep's case was condemned by Pennsylvania State Headquarters of Selective Service System. (228) This circumstance should be considered by the court, together with the testimony of the clerk of the local board, in determining whether or not there was a violation of Estep's procedural rights.

In addition to violating the procedural rights guaranteed by law to Estep through withholding of evidence from the board of appeal, the local board affirmatively injured Estep. It violated Section 627.13 of the Regulations by writing a false, inflammatory and prejudicial letter to the board of appeal. (223) That regulation requires that the local board, in preparing the cover sheet and in forwarding it to the board of appeal, "shall be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision."² The letter consisted only of argument and expression of opinion in favor of its decision.

Assuming *arguendo*, that Estep's going to the end of the selective process by refusing to submit to the induction ceremony does not exhaust the remedies sufficiently to entitle him to challenge the erroneousess of his classification, there is nevertheless a different problem presented

¹ The construction here contended for was adopted by the Selective Service System in *Rinko v. United States*, No. 1071, October Term 1944, cert. den. 65 S. Ct. 1086. See Record; pp. 208-213.

² The argument made under this point as to the violation of Estep's procedural rights, contrary to the due process clause of the Fifth Amendment, the Act and the Regulations, is fully supported by the cogent dissent of Judge Biggs. See record pages 289-299.

here. The withholding of evidence by the local board denied the final and real classifying agency of the Selective Service System the right to a full review of appellant's case. The act of the local board was tantamount to a denial of the right of appeal. It is a denial of procedural due process so as to make the order upon which the indictment is based void and the same as though no order had been issued at all. Under these circumstances the courts have held that the illegality of the order can be considered in defense to the indictment and that the doctrine of *Falbo v. United States*, *supra*, does not apply. *Tung v. United States* (CCA-1) 142 F. 2d 919. The decision of the court below conflicts directly with the *Tung* decision. Cf. *United States v. Peterson* (USDC-ND Calif.) 53 F. Supp. 760; *United States v. Lair* (USDC-ND Calif.) 52 F. Supp. 393; *Ex parte Stanziale* (CCA-3) 138 F. 2d 312. It should be observed in the *Tung* case that the Government accepted the decision of the First Circuit as the law by not applying for certiorari, which was available to it.

The *Tung* decision is attempted to be distinguished by the majority opinion of the court below on the ground that *Tung* had not abandoned his administrative remedies but was attempting to pursue them. This effort on the part of the court below proves all the more that its decision in the instant case is in direct conflict with the *Tung* decision of the First Circuit! The undisputed evidence shows that *Estep* had not abandoned the administrative remedies. Indeed, he was attempting to invoke them as did *Tung*! The local board defiantly refused to follow the Regulations and deprived him of his right of appeal in the same way as did the board in the *Tung* case.

Conclusion

Without having had their day in court, approximately 4,000 of Jehovah's witnesses in the United States have been branded as criminals and put in federal prisons under the Selective Training and Service Act of 1940. They were convicted because the courts refused to permit them to show in their defense that the administrative determinations supporting the indictments were illegal. Such citizens have been incarcerated without a judicial trial, contrary to the Constitution.

This mountain of flesh-and-blood testimony towers high above all other records of wartime prosecutions to stand as a monument of warning to the judiciary that unless that alien doctrine which catapulted them into prison is destroyed now it will inevitably extend into other fields of administrative law. That one may be denied the right to challenge in court the legality of a final administrative order presents a threat to the liberties of all the people. Indeed, in addition thereto, it raises a clear and present danger to the judiciary, that it can be destroyed by an administrative hydra over which the courts lose all control.

Whatever may have been the reasons of policy that were proclaimed as justification for denial of judicial trial in the prosecutions of those thousands of men it is clear that no such specious grounds exist in the cases at bar. Here the records show that petitioners have completed all the administrative remedies. Each finished the selective process. Each was found acceptable by the armed forces. Smith was restrained of his liberty by them until ordered discharged by the writ of *habeas corpus*.

Denial of judicial review by the courts below of the illegality of the administrative action is a grave error that seriously affects the fairness, integrity, and public reputation of judicial proceedings. Their grave departure from

the usual and accepted course in judicial proceedings deserves the reprobation of this Court rather than approbation as claimed by the Government.

The political and practical considerations of policy that have been invoked by all the courts in denying judicial review to Jehovah's witnesses convicted under the Act should never have been the concern of the courts. Policy and practical considerations are not justification for denial of a citizen's constitutional rights. Even in England, where the courts have far less power than they do in the United States, such policy considerations have been rejected. In 1770, Lord Mansfield, in *Rex v. Wilkes*, 4 Burr. 2527, hung a beacon light that serves well to guide this Court. He said: "It is fit to take some notice of the various terrors rung out; the numerous crowds that have attended and now attend in and about the hall, out of reach of hearing what passes in Court; and the tumults which in other places have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotion and general confusion. Give me leave to take the opportunity of this great and respectable audience, to let the whole world know that all such attempts are vain. Unless we have been able to find an error that will bear us out to reverse the outlawry it must be affirmed. The constitution does not allow reason of state to influence our judgment: God forbid it should: We must not regard political consequences how formidable soever they might be; if rebellion was the certain consequence we are bound to say, 'Fiat Justitia Ruat Coelum'." *

* "Let justice be done, though the heavens fall."

In ancient days of the primitive prototype of Jehovah's witnesses, the apostles of Christ Jesus, similar policy considerations were quickly disposed of by that sage Hebrew justice, Gamaliel, in these words, to wit, "Refrain from these men, and let them alone: for if this counsel or this work be of men, it will come to nought: but if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God."—Acts 5: 34-40.

The judgments of the courts below should be reversed and the indictments ordered dismissed. In the alternative, the judgments should be reversed and the causes remanded to the trial courts for new trials not inconsistent with the opinions that may be written herein.

Respectfully submitted,

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and

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 66

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HAYDEN C. COVINGTON

GROVER C. POWELL

CURRAN E. COOLEY

Counsel for Petitioner

No. 292

WILLIAM MURRAY ESTEP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

HAYDEN C. COVINGTON

Counsel for Petitioner

APPENDIX
to Joint Brief for Petitioners

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APPENDIX

Selective Training and Service Act of 1940 as amended

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[EXCERPTS]

Sec. 2. Registration in general.

Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit for registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.

Sec. 3. Training and service in general.

(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: . . .

Provided further, That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined. . . .

. . .

Sec. 5. Persons not required to register; Deferment exemption, and relief from training and service.

• • •

(c) (1) The Vice President of the United States, the Governors, and all other State officials chosen by the voters of the entire State, of the several States and Territories, members of the legislative bodies of the United States and of the several States and Territories, judges of the courts of record of the United States and of the several States and Territories and the District of Columbia, shall, while holding such offices, be deferred from training and service under this Act in the land and naval forces of the United States.

• • •

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

• • •

(g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service

because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

(h) No exception from registration, or exemption or deferment from training and service, under this Act, shall continue after the cause therefor ceases to exist.

• • •

Sec. 10. Rules and regulations; Selective Service System.

(a) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards, civilian appeal boards and such other agencies, including agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal

boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (1) of this Act. No person who is an officer, member, agent or employee of the Selective Service System, or of any such local or appeal board or other agency, shall be excepted from registration, or deferred from training and service, as provided for in this Act, by reason of his status as such officer, member, agent, or employee; . . .

Sec. 11. Penalties.

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto; or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant

to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

Selective Service Regulations

[SECOND PRINTING—SECOND EDITION]

615.82 Preparation of cover sheets.

After each registrant in Group 1, Group 2, Group 3, Group 5, or Group 6 listed in the Classification Record (Form 100), the local board shall open an individual file for him by preparing a Cover Sheet (Form 53). These Cover Sheets (Form 53) shall be maintained in a file in the local board. Every paper pertaining to the registrant, except his Registration Card (Form 1) and such other papers and documents as may be designated by the Director of Selective Service shall be filed in his Cover Sheet (Form 53), until authorization to remove it has been received from the Director of Selective Service.

621.1 Mailing Questionnaires.

(a) Except as provided in paragraph (d) of this section, the local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return.

621.4 Claims for, or information relating to, deferment.

(a) The registrant shall be entitled to present all written information which he believes to be necessary to assist the local board in determining his proper classification. Such information should be included in or attached to the Selective Service Questionnaire (Form 40) and may include any documents, affidavits, or depositions. The affidavits and depositions shall be as concise and brief as possible.

(b) Any person other than the registrant who desires

to request the deferment of a registrant may file with the local board an official form of the Selective Service System provided for that purpose. Any such person shall be entitled to present information in support of his request. Such information should be included in or attached to the official form of the Selective Service System and may include any documents, affidavits, or depositions supporting the request.

. . .

622.11 Class I-A: Available for military service.

In Class I-A shall be placed every registrant who, upon classification, has not been placed in Class I-C, Class IV-E, Class I-A-O, or in a deferred class.

622.12 Class I-A-O: Available for noncombatant military service; conscientious objector.

In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant military service in which he might be ordered to take human life, but not conscientiously opposed to noncombatant military service in which he could contribute to the health, comfort, and preservation of others.

. . .

622.44 Class IV-D: Minister of religion or divinity student.

(a) In Class IV-D shall be placed any registrant:

- (1) Who is a regular minister of religion, or
- (2) Who is a duly ordained minister of religion, or
- (3) Who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act of 1940 (September 16, 1940), or
- (4) Who has been accepted for admittance to a theological or divinity school referred to in subparagraph (3) above and who, on a full-time and accelerated

basis under the general direction of such theological or divinity school, is pursuing a course of study required by the theological or divinity school in which he has been accepted for admittance and who has been formally accepted as a candidate for the ministry by the highest authority governing ordination of a recognized church, religious sect, or religious organization.

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

. . .

622.51 Class IV-E: Conscientious objector available for, assigned to, or released from work of national importance.

(a) In Class IV-E shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service.

. . .

623.1 General principles of classification.

(a) Each registrant shall be classified as soon as practicable after his Selective Service Questionnaire (Form 40) is received by the local board or as soon as practicable after the time allowed for him to return his Selective Service Questionnaire (Form 40) has expired.

(b) It is the local board's responsibility to decide in the first instance the class in which each registrant shall be placed.

(c) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.

623.2 Information considered for classification.

The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (Form 42), or Affidavit—Occupational Classification (Form 42A), and such other written information as may be contained in his file; provided, however, when a registrant has failed or hereafter fails to return his Selective Service Questionnaire (Form 40) within the time allowed by section 621.2 or when he has failed or hereafter fails to provide the local board with any other information concerning his status which he is requested or required to furnish, the local board shall proceed with his classification without such information. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file.

. . .

623.21 Order in which classes are to be considered.

(a) Upon undertaking to classify any registrant, consideration shall be given to the following classes in the order listed and the registrant shall be classified in the first class for which grounds are established:

Class I-C
Class IV-A
Class IV-D
Class IV-B
Class II-C
Class II-B
Class II-A
Class III-D
Class IV-C
Class IV-F (Moral)

• • •

625.1 Opportunity to appear in person.

(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

(c) If the written request of the registrant to appear in person is filed with the local board within the 10-day period or if it is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter upon the Classification Record (Form 100) the date on which the request was received and the date and time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (Form 57) to the registrant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, should advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter should be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made.

625.2 Appearance before local board.

(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the regis-

trant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

* * *

REOPENING REGISTRANT'S CLASSIFICATION

626.1 Classification not permanent.

(a) No classification is permanent.

(b) Each classified registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other

steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

626.2 When registrant's classification may be reopened and considered anew.

(a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) or an Order to Report for Work of National Importance (Form 50) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the Director of Selective Service; provided, that after a registrant has left the local board for delivery pursuant to an Order to Report for Work of National Importance (Form 50) the local board shall reopen and consider anew the classification of such registration only upon the written request of the Director of Selective Service.

625.3 Refusal to reopen and consider anew registrant's classification.

When a registrant, any person who claims to be a dependent of a registrant, any interested party in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, should advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and should place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

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PROCEDURE FOR TAKING APPEAL**627.11 How appeal to board of appeal is taken.**

(a) Any person entitled to do so may appeal in either of the following ways:

(1) By filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal.

(2) By signing the "Appeal to Board of Appeal" on the Selective Service Questionnaire (Form 40).

(b) The local board shall enter on the Classification Record (Form 100) the date on which an appeal is filed.

627.12 Statement of person appealing.

The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

627.13 Local board to prepare and forward file and DSS**Form 66.**

(b) Immediately upon completion of the actions required by paragraph (a) of this section, the local board shall attach the Individual Appeal Record (Form 66) to the inside of the registrant's Cover Sheet (Form 53) and shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary, the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.

627.24 Review by board of appeal.

(a) Except as provided in section 627.51 (c), the board of appeal shall consider appeals in the order in which they are received unless otherwise directed by the Director of Selective Service, in which event, they shall be considered in such order as the Director of Selective Service shall prescribe.

(b) In reviewing the appeal, the board shall not receive or consider any information which is not contained in the record received from the local board except (1) the advisory recommendation from the Department of Justice under section 627.25, and (2) general information concerning economic, industrial, and social conditions.

627.25 Special provisions where appeal involves claim that registrant is a conscientious objector.

(a) If an appeal involves the question of whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the board of appeal shall take the following action:

(1) First determine whether the registrant should be classified in one of the classes set forth in section 623.21 in the order set forth except Class IV-F for physical or mental disability and, if it so determines, it shall place the registrant in such class; or

(2) If it determines that the registrant should not be classified in one of the classes set forth in section 623.21 and the registrant has claimed classification in Class IV-E, determine whether to place the registrant in such class and, if it so determines, it shall place the registrant in Class IV-E; or

(3) If it determines that the registrant should not be classified in one of the classes set forth in section 623.21 and the registrant has not claimed classification in Class IV-E but has claimed classification in Class I-A-O, determine whether to place the registrant in such class and, if it so determines, it shall place the registrant in Class I-A-O; or

(4) If it determines not to place such registrant in one of the classes set forth in section 623.21 or in Class IV-E or in Class I-A-O under the circumstances set forth in subparagraphs (1), (2), or (3) above, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the

board of appeal is located for the purpose of securing an advisory recommendation from the Department of Justice.

No registrant's file shall be forwarded to the United States Attorney by any board of appeal, and any file so forwarded shall be returned, unless in the "Minutes of Other Actions" on the Selective Service Questionnaire (Form 40) the record shows and the letter of transmittal states that the board of appeal reviewed the file and determined that the registrant should not be classified in one of the classes set forth in section 623.21 (except Class IV-F for physical or mental disability) or in Class IV-E or Class I-A-O under the circumstances set forth in subparagraphs (1), (2), or (3) above.

(b) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the board of appeal (1) that if the registrant is inducted into the land or naval forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be assigned to work of national importance under civilian direction. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the board of appeal that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the board of appeal shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The board of appeal shall place in the Cover Sheet (Form 53) of the registrant both the letter containing the recommendation

of the Department of Justice and the report of the Hearing Officer of the Department of Justice.

627.26 Decision of board of appeal.

(a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant, except that a board of appeal may not place a registrant in Class IV-F because of physical or mental disability unless (1) the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability, and (2) the board of appeal has determined that the registrant is not entitled to any other deferred classification.

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 626.

628.1 Who may appeal to the President from any determination of a board of appeal.

(a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

(b) An appeal to the President may be taken by the Director of Selective Service (1) by mailing to the local board, through the State Director of Selective Service, a written notice of appeal or (2) by placing in the registrant's file a written notice of appeal and, through the State Director of Selective Service, advising the local board thereof.

(c) An appeal to the President may be taken by the State Director of Selective Service (1) by mailing to the local board a written notice of appeal and directing the

local board to forward the registrant's file to him for transmittal to the Director of Selective Service or (2) by placing in the registrant's file a written notice of appeal and advising the local board thereof. Before he forwards the registrant's file to the Director of Selective Service, the State Director of Selective Service shall place in such a file a written statement of his reasons for taking such appeal.

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629.1 Who will be examined.

Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent.

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629.11 Certain registrants may request transfer.

(a) Any registrant who has received an Order to Report—Preinduction Physical Examination (Form 215) and who is so far from his own local board that reporting to his own local board would be a hardship may be transferred for preinduction physical examination (including local board physical examination under section 629.4, when applicable) to the local board having jurisdiction of the area in which he is at that time located.

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629.21 Duty of registrant to report for and submit to preinduction physical examination.

(a) When the local board mails to a registrant an Order to Report—Preinduction Physical Examination (Form 215), it shall be the duty of the registrant to report for such examination at the time and place fixed in such order unless, after the date the Order to Report—Preinduction Physical Examination (Form 215) is mailed and prior to the time fixed therein for the registrant to report for his preinduction physical examination, the local board cancels such Order to Report—Preinduction Physical Examination

(Form 215) or postpones the time when such registrant shall so report and advises the registrant in writing of such cancellation or postponement.

. . .

(c) Upon reporting for preinduction physical examination, it shall be the duty of the registrant: (1) To follow the instructions of a member or clerk of the local board as to the manner in which he will be transported to the location where his preinduction physical examination will take place, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for preinduction physical examination, (3) to appear for and submit to such examination as the commanding officer of the induction station shall direct, and (4) to follow the instructions of a member or clerk of the local board as to the manner in which he will be transported on his return trip from the place where his preinduction physical examination takes place.

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629.31 Records returned to local board.

(a) The Commanding Officer of the induction station will return to the local board the following documents concerning registrants forwarded for preinduction physical examination: The original Physical Examination List (Form 217) indicating under column 4 the disposition of each registrant forwarded for preinduction physical examination, the Original, First Copy, and Second Copy of the Report of Physical Examination and induction (Form 221), and all other records forwarded by the local board except the records bearing upon the medical, social, and educational history of the registrant.

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629.33 Action when further serology requested for accepted registrant.

When it is indicated on a registrant's Certificate of Fitness (Form 218) that his serology is other than "Negative" and it is requested that the registrant be given further

serological tests, the local board shall direct the registrant to submit to such further serological tests as may be necessary and it shall be the duty of the registrant to present himself for and submit to such serological tests at the time and place fixed by the local board. The results of such serological tests shall be attached to the Original of the registrant's Report of Physical Examination and Induction (Form 221) and shall be forwarded with the registrant when he is forwarded for induction.

* * *

633.2 Order to Report for Induction (Form 150).

(a) Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150) in duplicate. The date specified for reporting for induction shall be at least 10 days after the date on which the Order to Report for Induction (Form 150) is mailed. The local board shall mail the original of the Order to Report for Induction (Form 150) to the registrant and shall file the copy in his Cover Sheet (Form 53).

(b) In case of death or extreme emergency to a person in the registrant's immediate family, serious illness of registrant, or other extreme emergency beyond the registrant's control, the local board may, after the Order to Report for Induction (Form 150) has been issued, postpone the time when such registrant shall so report for a period not to exceed 60 days from the date of such postponement, subject, however, in cases of imperative necessity, to one further postponement for a period not to exceed 60 days; and provided also that the Director of Selective Service or any State Director of Selective Service (as to registrants within his State) may, for good cause, at any time prior to the issuance of an Order to Report for Induction (Form 150), order a local board to postpone the issuance of such order until such time as he may deem advisable, or the Director of Selective Service or any State Director of Selective Service (as to registrants within his State) may, for good

cause, at any time after the issuance of an Order to Report for Induction (Form 150), order a local board to postpone the induction of a registrant until such time as he may deem advisable, and no registrant shall be inducted into the land or naval forces during the period of any of such postponements.

(c) The date of issuance and the date of expiration of any period of postponement authorized in paragraph (b) above shall be noted in the "Remarks" column of the Classification Record (Form 100).

(d) Any period of postponement may be terminated before the date of expiration when the issuing authority so directs.

. . .

633.21 Duty of registrant to report for and submit to induction.

(a) When the local board mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant: (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induc-

tion will be accomplished; (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board.

652.1 Report of conscientious objector to Director of Selective Service.

(a) When a registrant is classified in Class IV-E and his classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance or take an appeal has expired, and his order number is reached in the process of selecting Class I-A and Class I-A-O registrants to report for induction, the local board shall immediately notify the Director of Selective Service on Conscientious Objector Report (Form 48) that the registrant is available for assignment to work of national importance under civilian direction.

(b) Four copies of the Conscientious Objector Report (Form 48) shall be filled out and signed by a member of the local board. Under "Remarks" the local board should add any additional information that might aid in the proper assignment of the registrant. The original and two copies of the Conscientious Objector Report (Form 48) shall be mailed to the State Director of Selective Service and the remaining copy retained in the registrant's Cover Sheet (Form 53). The State Director of Selective Service shall immediately transmit the original and one copy of the Conscientious Objector Report (Form 48) to the Director of Selective Service and shall file the remaining copy.

652.11 Preparation and distribution of Order to Report; delinquency of IV-E registrants.

(a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall

prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV-E² Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Original and First Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Second Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service: Mail or deliver to the registrant before the time set for him to report, the original of the Order to Report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director of such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national impor-

tance under civilian direction for the period, at the place, and in the manner provided by law.

652.12 Transportation to camp.

(a) When a registrant in Class IV-E reports to the local board for transportation to a camp for work of national importance under civilian direction, the local board shall prepare the necessary Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals and Lodgings for Civilian Registrants (Form 256) for use by the registrant between the local board and the camp. Except as otherwise provided herein, the local board will follow the same procedure in delivering the registrant to work of national importance under civilian direction as is followed in the case of a registrant delivered for induction into the land or naval forces.

(b) The delivery of a person paroled to work of national importance under civilian direction will be accomplished by the proper prison officials.

653.11 Reception at camps.

(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service, one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been

any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

. . .

653.12 Duties.

Assignees shall report to the camp to which they are assigned; remain therein until released or transferred elsewhere by proper authority, except when performing assigned duties or on authorized missions or leave outside of camp; perform their assigned duties, promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed or such directions as may be issued from time to time by the Director of Selective Service.

. . .

VOL. III OPINION NO: 14**NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM**

SUBJECT: Ministerial status of Jehovah's Witnesses
Facts:

Jehovah's Witnesses claim exemption from training and service and classification in Class IV-D as duly ordained ministers of religion under Section 5 (d), Selective Training and Service Act of 1940 and Paragraph 360, Selective Service Regulations which read as follows:

Section 5 (d):

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Paragraph 360:

"Class IV-D: Minister of religion or divinity student.

a. In class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in theological or divinity school recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

b. A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

c. A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and

to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Question.—May Jehovah's Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer:

1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character of organization of Jehovah's Witnesses renders comparisons with recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, places them in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers of other religions.

3. There are those members of Jehovah's Witnesses who devote their full time effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and of the Bethel family,

which includes workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. The names of those who form this group are recorded in the executive offices of the Watchtower Bible and Tract Society, Inc. Members of this group who devote their entire time and effort to the publications and supplies of the Society have a standing in relationship to that organization and the other members of Jehovah's Witnesses which brings them within the purview of Section 5 (d) of the Selective Training and Service Act of 1940 and they may be classified in Class IV-D, providing their names appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System.

4. The members of Jehovah's Witnesses who devote their time to the work of teaching the tenets of their religion and in the converting of others to their belief, and who enjoy the esteem of other Jehovah's Witnesses, and are each individually recorded as "pioneers" by the Watchtower Bible and Tract Society, Inc., at its executive offices in Brooklyn, New York, are in a position where they may be recognized as having a standing, in relationship to the organization and to the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers in other religions, and such persons who spend all or a substantial part of their time in the work of Jehovah's Witnesses, as set forth above, come within the purview of Section 5 (d) of the Selective Training and Service Act of 1940 and may be classified in Class IV-D, provided that the names of such persons appear on the certified official list of such persons transmitted to State Directors of Selective Service by National Headquarters of the Selective Service System.

5. The members of Jehovah's Witnesses who occupy the capacities are known by the various names of regional servants, zone servants, company servants, sound servants, advertising servants, back-call servants, and by other similar

descriptive titles, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

Lewis B. Hershey,
LEWIS B. HERSHEY
Deputy Director

Legal

June 12, 1941

File Reference III—Ministers

Sec. 5 (d); Par. 360, S.S.R.

VOL. III OPINION NO. 14 (AMENDED)**NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM****SUBJECT: Ministerial Status of Jehovah's Witnesses****FACTS:**

Jehovah's Witnesses claim exemption from training and service and classification in Class IV-D as duly ordained ministers of religion under section 5 (d), Selective Training and Service Act of 1940, as amended, and section 622.44, Selective Service Regulations, Second Edition, which read as follows:

Section 5 (d):

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Section 622.44:

"Class IV-D: Minister of religion or divinity student.

(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, re-

ligious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Question—May Jehovah's Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer:

1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation, the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character of organization of Jehovah's Witnesses renders comparisons with recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions.

3. Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group receive their

subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consist of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in the converting of others to their belief. A certified official list of members of the Bethel Family and pioneers is being transmitted to the State Directors of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The members of the Bethel Family and pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and they may be classified in Class IV-D. The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

4. The original paragraph 4 has been consolidated with paragraph 3 of this amended Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers

in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

LEWIS B. HERSHEY,
DIRECTOR

LBH/spd

Legal

November 2, 1942

Secs. 5(d), 622.44

DISTRIBUTION "A,B,C,D"

STATE DIRECTOR ADVICE (No. 88)**NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM**

21ST STREET AND C STREET, N. W.,
WASHINGTON, D. C.

October 29, 1942

Subject: Official List of Jehovah's Witnesses

It has been deemed advisable to change the policy regarding the addition of names to the revised official list of Bethel Family and Pioneers of Jehovah's Witnesses attached to Memorandum to State Directors No. 381.

All registrants whose names now appear on the list will remain in precisely the same status as previously enunciated, but no further names will be added to the list by this Headquarters.

A new and final list consolidating all former lists and showing the names of Bethel Family and Pioneers of Jehovah's Witnesses, who have heretofore been approved by this Headquarters and who have not subsequently been removed, will be distributed to State Directors at an early date.

Attached, for your information, is copy of letter addressed to the representative of Jehovah's Witnesses, by this Headquarters, further indicating the change in policy with respect to the use of such list.

Opinion No. 14, Volume II, National Headquarters, dated June 12, 1941, has been revised in accordance with the foregoing policy.

Attachment

LBH/spd

DISTRIBUTION "A, B"

[signed] Lewis B. Hershey
DIRECTOR

LETTER

**NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM**

21ST STREET AND C STREET, N. W.
WASHINGTON, D. C.

IN REPLYING ADDRESS
THE DIRECTOR OF SELECTIVE SERVICE
AND REFER TO NO.
3-10.26-144

Hayden Covington, Esq.
117 Adams Street
Brooklyn, New York

Subject: List of Members of the Bethel Family
and Pioneers of Jehovah's Witnesses

Dear Mr. Covington:

As stated to you at the conference held in this headquarters on October 22, 1942, the policy of National Headquarters, Selective Service System, in reference to Jehovah's Witnesses, has been revised.

This headquarters has discontinued the practice of placing upon the certified list of the Bethel Family and Pioneers of Jehovah's Witnesses, the names of any additional persons. The general policy promulgated at the time this list was established shall remain in full force and effect, except for this practice.

Registrants now who appear on the list, as of this date, shall remain in the same status as heretofore expressed.

Applications and statements for listing on file in this headquarters and not acted upon, will be forwarded to the appropriate State Directors to be transmitted to the local board having jurisdiction over registrant concerned, to be placed in such registrant's cover sheet.

For the Director,
[signed] Lewis F. Kosch
LEWIS F. KOSCH
Colonel, Field Artillery
Chief, Camp Operations Division

STATE DIRECTOR ADVICE (No. 213-B)

ISSUED: 6/7/44

NATIONAL HEADQUARTERS SELECTIVE SERVICE SYSTEM

SUBJECT: THE MINISTERIAL STATUS OF CERTAIN OF THE OFFICIALS OF SPECIFIED CHURCHES, RELIGIOUS SECTS, OR RELIGIOUS ORGANIZATIONS

INTRODUCTION

Concerning the classification of registrants who claim to be ministers of religion, section 622.44, Selective Service Regulations, provides as follows:

"(a) In Class IV-D shall be placed any registrant:

- (1) Who is a regular minister of religion, or
 - (2) Who is a duly ordained minister of religion, or
- . . .

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

PART I

1. Because of the unusual nature of the organization and work of certain religious groups, National Headquar-

ters has been called, from time to time, to make predeterminations relating to the question of whether a particular group comes within the purview of the Regulations as a recognized church, religious sect, or religious organization.

2. The issuance of a complete list of recognized churches, religious sects, or religious organizations, is not contemplated by this Headquarters. Therefore, the fact that a particular organization is not mentioned in this State Director Advice should not be taken to mean that it is not a recognized church, religious sect, or religious organization.

3. Information will be furnished upon request of any agency of the Selective Service System as to whether a predetermination has been made regarding any particular organization. If no predetermination has been made, a study will be conducted and a predetermination made.

PART II

1. Statements of opinion have been issued occasionally regarding the nature and work of those offices or positions of leadership in a recognized church, religious sect, or religious organization which are generally recognized to be ministerial in nature and function.

2. In part IV of this State Director Advice is listed information relating to certain offices of ministerial function in various organizations. Each organization referred to has been predetermined by National Headquarters to be a recognized church, religious sect, or religious organization within the purview of the Act and the Regulations. The offices of ministerial function of such groups as indicated have been predetermined by National Headquarters to come within the meaning of the Act and the Regulations as offices of regular or duly ordained ministers of religion.

3. The following are the recognized churches, religious sects, or religious organizations concerning which statements of opinion are issued in part IV of this State Director Advice:

- (a) Salvation Army.
- (b) Holy Roman Catholic Church—Lay Brothers.
- (c) Jehovah's Witnesses.
- (d) Church of Christ, Scientist.
- (e) Evangelical Lutheran Synod of Missouri, Ohio, and Other States—Christian Day School Teachers.
- (f) Evangelical Lutheran Joint Synod of Wisconsin and Other States—Christian Day School Teachers.
- (g) Jewish Congregations—Cantors.
- (h) Volunteers of America.
- (i) Church of Jesus Christ of Latter Day Saints (Mormon).
- (j) Seventh-day Adventist Church—Colporteurs and Day School Teachers.

PART III

1. Whether a registrant who qualifies under the statements hereinbefore made, is actually engaged in the regular discharge of his duties as a regular or duly ordained minister of religion must be determined in each individual case by the local board or agency of appeal.

2. It is the opinion of National Headquarters that the question of the regular discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified in Class IV-D in accordance with the provisions of paragraphs (b) and (c) of section 622.44 of the Regulations.

3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some churches both practice and necessity require the minister to support himself, either partially or wholly, by secular work.

4. In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status.

PART IV

1. SALVATION ARMY

Commissioned officers of the Salvation Army are consecrated to their religious beliefs, and occupy with respect to their organization the exalted position held by other ministers in more familiar denominations. The commission granted any commissioned officer of the Salvation Army is an ordination. By reason of the position they occupy and their ordination in such position, registrants who are commissioned officers of the Salvation Army, as they are now constituted, may be considered duly ordained ministers of religion.

2. HOLY ROMAN CATHOLIC CHURCH—Lay Brothers

It appears that Catholic Brothers have made profession of the vows required of them by their respective religious Congregations, such as poverty, chastity, obedience, and are said to devote all of their time to their Congregations. Moreover, when the Selective Training and Service Act was being discussed in Congress, it was made clear that it was intended that the Brothers were included in the purview of the statutory exemption from training and service of regular ministers of religion. It is believed that they are and should be considered "regular ministers of religion."

It has been officially certified to the National Headquarters by an official of the church that:

"I beg to certify that according to the laws of the Church, the term 'Brother' or 'Lay Brother' signifies a regular minister of religion.

"'Lay Brothers' in all the canonically approved societies, orders and congregations are religious ministers in the fullest sense of that term as defined in the Code of Canon Law (Canon 488,70). They are deliberately received into an ecclesiastically approved religious order by the profession of the vows of solemn promises of religion; they, as real ministers of religion, may cooperate in the sacred min-

istry of the priests and the salvation of souls, by the performance of the special tasks assigned to them in schools, hospitals, religious institutes, houses of study or elsewhere. "The 'Lay Brothers,' so-called, are not only bound to the obligations of the clerical state (Cfr. Canons 592 and 679) but they also enjoy the very same privileges as clerics (Cfr. 614 and 680)."

3. JEHOVAH'S WITNESSES

Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

Experience has shown that due to the fact that a large proportion of the members of any Jehovah's Witnesses unit claim to be ministers, special care must be used in applying the above-mentioned tests. Information presented in the case of a registrant who claims to be a minister of the Jehovah's Witnesses group must show facts regarding both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status.

Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group are said to

receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms.

Pioneers of Jehovah's witnesses are those members of Jehovah's witnesses who devote all or substantially all of their time to the dissemination of the tenets and beliefs of Jehovah's Witnesses.

A certified official list of members of the Bethel Family and Pioneers has been transmitted to the State Directors of Selective Service by National Headquarters as an attachment to the State Director Advice No. 213-C. The members of the Bethel Family and Pioneers whose names appear upon such certified official list were thought at the time the list was issued to come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and if they have continued in the same status, they should be classified in Class IV-D. The status of members of the Bethel Family and Pioneers whose names do not appear upon such certified official list shall be determined as herein provided.

Other members of Jehovah's Witnesses, known by the various names of servant to the brethren, company servant, assistant company servant, backcall servant, territory servant, advertising servant, account servant, stock servant, and other servants, devote their time and effort in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. Often the servants to the brethren and the company servants are found to be devoting their lives to a work of ministry to the substantial exclusion of secular employment. In such cases, they may be considered for classification into Class IV-D as ministers of religion.

4. CHURCH OF CHRIST, SCIENTIST

Members of the Church of Christ, Scientist, who are Christian Science practitioners whose names appear in the Christian Science Journal as being recognized or certified practitioners may be considered regular ministers of religion.

First and Second Readers, Christian Science lecturers and Christian Science wartime ministers and Readers of the Church of Christ, Scientist, while serving in those capacities, and actually holding such offices, during their designated terms, may be considered regular ministers of religion.

5. EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO AND OTHER STATES— CHRISTIAN DAY SCHOOL TEACHERS

Teachers in the Christian day schools of the Evangelical Lutheran Synod of Missouri, Ohio and Other States may be considered regular ministers of religion if they have devoted their lives to the furtherance of the religious beliefs of the church, if they have been called by a congregation and assigned to teach in a parochial school in the same way the pastor of the congregation is called and if they are regarded by other members of the church in the same manner in which regular ministers are ordinarily regarded.

Regarding such a teacher, it has been stated to this Headquarters by the church that:

"He is called by the Christian congregation in the same way as the pastor is called, and all that is said in Holy Scriptures of the bishop (1 Tim. 3) applies to the regular teacher of the Lutheran day school in his particular work. A teacher of a Lutheran school is called 'for life' by the congregation, and he will not accept the call of another congregation except after due counsel with the congregation which he serves at the time of receiving the new call.

The office of parochial school teacher was established

after the Reformation. That of the regular Lutheran day-school teacher is part of the office of the holy ministry, inasmuch as he 'labors in the Word and doctrine.' "

6. EVANGELICAL LUTHERAN JOINT SYNOD OF WISCONSIN AND OTHER STATES— CHRISTIAN DAY SCHOOL TEACHERS

Teachers in the Christian Day Schools of the Evangelical Lutheran Joint Synod of Wisconsin and Other States should be considered in exactly the same manner as is provided in such cases with regard to the Evangelical Lutheran Synod of Missouri, Ohio and other States.

7. JEWISH CONGREGATIONS—CANTORS

In an exceptional case, a Jewish congregation may have no ordained rabbi, but instead will accept as rabbi a person who lacks ordination. The person so engaged to act in the capacity of rabbi may be a cantor. In such an instance, the cantor performs virtually all of the functions normally performed by a rabbi, including the giving of advice upon specific questions of Jewish law, the preaching of sermons, the teaching and expounding of the law; and the congregation regards him as their spiritual leader. In such an exceptional case, the cantor may be considered a regular minister of religion.

8. VOLUNTEERS OF AMERICA

The commissioned officers of the Volunteers of America are duly ordained and commissioned after due preparation and a satisfactory examination. It also appears that these commissioned officers customarily preach and teach the principles of religion in accordance with the prescribed form of worship recognized by the organization. Therefore, they may be considered regular or duly ordained ministers of religion.

9. CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS (MORMON)

Those registrants who have been ordained in the Melchizedek Priesthood of the Church of Jesus Christ of the Latter Day Saints (Mormon) and who are serving in any of the capacities hereinafter listed, may be considered regular ministers of religion within the meaning of the Act and the Regulations, so long as they hold any of these positions:

- (a) The first presidency of three men.
- (b) The presiding patriarch or quorum of twelve apostles.
- (c) The first seven presidents of seventies.
- (d) The presiding bishopric of the church of three men.
- (e) The president and two counselors of each stake.
- (f) The bishop and two counselors of each ward.
- (g) The president and two counselors of each independent branch.
- (h) The president of each dependent branch.
- (i) The president of each mission.
- (j) Those men who have been ordained as elders of seventies and who hold formal certificates as missionaries.

SEVENTH-DAY ADVENTIST CHURCH COLPORTEURS AND DAY SCHOOL TEACHERS

Members of this church consider their colporteur evangelistic work to be of highest importance in the propagation of the faith. They look upon the men who do this work as engaged in a vocation comparable to the gospel ministry, even though they are not ordained. When a registrant is found to be actually engaged in a bona fide manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials, he may be considered a regular minister of religion.

The teachers in the day schools of this church are looked upon by members of the denomination as engaged in sacred work comparable to that of the gospel ministry. They are

the religious instructors of the children and youth of the church, and even though they are not ordained, they have given their lives and are devoting their time to the religious activities of the church. Such teachers may be considered regular ministers of religion.

Lewis B. Hershey,
DIRECTOR

STATE DIRECTOR ADVICE (No. 213-B)

ISSUED: 6/7/44

AS AMENDED: 9/25/44

**NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM**

SUBJECT: THE MINISTERIAL STATUS OF CERTAIN OF THE OFFICIALS OF SPECIFIED CHURCHES, RELIGIOUS SECTS, OR RELIGIOUS ORGANIZATIONS

INTRODUCTION

Concerning the classification of registrants who claim to be ministers of religion, section 622.44, Selective Service Regulations, provides as follows:

“(a) In Class IV-D shall be placed any registrant:

- (1) Who is a regular minister of religion, or
- (2) Who is a duly ordained minister of religion, or

“(b) A ‘regular minister of religion’ is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

“(b) A ‘duly ordained minister of religion’ is a man who has been ordained in accordance with the cere-

monial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

PART I

1. Because of the unusual nature of the organization and work of certain religious groups, National Headquarters has been called upon, from time to time, to make predeterminations relating to the question of whether a particular group comes within the purview of the Regulations as a recognized church, religious sect, or religious organization.

2. The issuance of a complete list of recognized churches, religious sects, or religious organizations, is not contemplated by this Headquarters. Therefore, the fact that a particular organization is not mentioned in this State Director Advice should not be taken to mean that it is not a recognized church, religious sect, or religious organization.

3. Information will be furnished upon request of any agency of the Selective Service System as to whether a predetermination has been made regarding any particular organization. If no predetermination has been made, a study will be conducted and a predetermination made.

PART II

1. Statements of opinion have been issued occasionally regarding the nature and work of those offices or positions of leadership in a recognized church, religious sect, or religious organization which are generally recognized to be ministerial in nature and function.

2. In Part IV of this State Director Advice is listed information relating to certain offices of ministerial function in various organizations. Each organization referred to has been predetermined by National Headquarters to be

a recognized church, religious sect, or religious organization within the purview of the Act and Regulations. The offices of ministerial function of such groups as indicated have been predetermined by National Headquarters to come within the meaning of the Act and the Regulations as offices of regular or duly ordained ministers of religion.

3. The following are the recognized churches, religious sects, or religious organizations concerning which statements of opinion are issued in Part IV of this State Director Advice:

- (a) Salvation Army.
- (b) Holy Roman Catholic Church—Lay Brothers.
- (c) Jehovah's Witnesses.
- (d) Church of Christ, Scientist.
- (e) Evangelical Lutheran Synod of Missouri, Ohio, and Other States—Christian Day School Teachers.
- (f) Evangelical Lutheran Joint Synod of Wisconsin and Other States—Christian Day School Teachers.
- (g) Jewish Congregations—Cantors.
- (h) Volunteers of America.
- (i) Church of Jesus Christ of Latter Day Saints (Mormon).
- (j) Seventh-day Adventist Church—Colporteurs and Day School Teachers.

PART III

1. Whether a registrant who qualifies under the statements hereinbefore made, is actually engaged in the regular discharge of his duties as a regular or duly ordained minister of religion must be determined in each individual case by the local board or agency of appeal.

2. It is the opinion of National Headquarters that the question of the regular discharge of his duties as a minister is a most important factor in determining whether a registrant should be classified in Class IV-D in accordance with the provisions of paragraphs (b) and (c) of section 622.44 of the Regulations.

3. The historic nature of the ministerial function of a registrant's own religious organization must be taken into consideration in each individual case. In some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work.

4. In view of the fact that the exemption of regular or duly ordained ministers of religion is a statutory provision of the Act, no particular form of document is specified for the presentation of information concerning such status.

PART IV

1. SALVATION ARMY

Commissioned officers of the Salvation Army are consecrated to their religious beliefs, and occupy with respect to their organization the exalted position held by other ministers in more familiar denominations. The commission granted any commissioned officer of the Salvation Army is an ordination. By reason of the position they occupy and their ordination in such position, registrants who are commissioned officers of the Salvation Army, as they are now constituted, may be considered duly ordained ministers of religion.

2. HOLY ROMAN CATHOLIC CHURCH—Lay Brothers

It appears that Catholic Brothers have made profession of the vows required of them by their respective religious Congregations, such as poverty, chastity, obedience, and are said to devote all of their time to their Congregations. Moreover, when the Selective Training and Service Act was being discussed in Congress, it was made clear that it was intended that the Brothers were included in the purview of the statutory exemption from training and service of regular ministers of religion. It is believed that they are and should be considered "regular ministers of religion."

It has been officially certified to National Headquarters by an official of the Church that:

"I beg to certify that according to the laws of the Church, the term 'Brother' or 'Lay Brother' signifies a regular minister of religion.

" 'Lay Brothers' in all the canonically approved societies, orders and congregations are religious ministers in the fullest sense of that term as defined in the Code of Canon Law (Canon 488, 79). They are deliberately received into an ecclesiastically approved religious order by the profession of the vows of solemn promises of religion; they, as real ministers of religion, may cooperate in the sacred ministry of the priests and the salvation of souls, by the performance of the special tasks assigned to them in schools, hospitals, religious institutes, houses of study or elsewhere.

"The 'Lay Brothers,' so-called, are not only bound to the obligations of the clerical state (Cfr. Canons 592 and 679) but they also enjoy the very same privileges as clerics (Cfr. 614 and 680)."

3. JEHOVAH'S WITNESSES

Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

Experience has shown that due to the fact that a large proportion of the members of any Jehovah's Witnesses unit claim to be ministers, special care must be used in applying the above-mentioned tests. Information presented in the case of a registrant who claims to be a minister of the Jehovah's Witnesses group must show facts regarding

both his ministerial position and his ministerial activities which clearly justify his exemption as a minister. Certificates, affidavits, or statements of opinion are not necessarily conclusive proof of a ministerial status.

Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs, of Jehovah's Witnesses and to convert others. For their religious services, the members of this group are said to receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms.

Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the dissemination of the tenets and beliefs of Jehovah's Witnesses.

A certified official list of members of the Bethel Family and Pioneers has been transmitted to the State Directors of Selective Service by National Headquarters as an attachment to State Director Advice No. 213-C. The members of the Bethel Family and Pioneers whose names appear upon such certified official list were thought at the time the list was issued to come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and if they have continued in the same status, they should be classified in Class IV-D. The status of members of the Bethel Family and Pioneers whose names do not appear upon such certified official list shall be determined as herein provided.

Other members of Jehovah's Witnesses, known by the various names of servant to the brethren, company servant, assistant company servant, backcall servant, territory serv-

ant, advertising servant, account servant, stock servant, and other servants, devote their time and effort in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. Servants to the brethren and company servants are believed to hold positions of greater responsibility and leadership than the other servants mentioned; however, the status of all of these 'servants' could be determined as herein provided.

4. CHURCH OF CHRIST, SCIENTIST

~~Members~~ of the Church of Christ, Scientist, who are Christian Science practitioners whose names appear in the Christian Science Journal as being recognized or certified practitioners may be considered regular ministers of religion.

First and Second Readers, Christian Science lecturers and Christian Science wartime ministers and Readers of the Church of Christ, Scientist, while serving in those capacities, and actually holding such offices, during their designated terms, may be considered regular ministers of religion.

5. EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO AND OTHER STATES— CHRISTIAN DAY SCHOOL TEACHERS

Teachers in the Christian day schools of the Evangelical Lutheran Synod of Missouri, Ohio and Other States may be considered regular ministers of religion if they have devoted their lives to the furtherance of the religious beliefs of the church, if they have been called by a congregation and assigned to teach in a parochial school in the same way the pastor of the congregation is called and if they are regarded by other members of the church in the same manner in which regular ministers are ordinarily regarded.

Regarding such a teacher, it has been stated to this Headquarters by the church that:

"He is called by the Christian congregation in the same way as the pastor is called, and all that is said in Holy Scriptures of the bishop (1 Tim. 3) applies to the regular teacher of the Lutheran day school in his particular part of the work. A teacher of a Lutheran school is called 'for life' by the congregation, and he will not accept the call of another congregation except after due counsel with the congregation which he serves at the time of receiving the new call.

"The office of parochial school teacher was established after the Reformation. That of the regular Lutheran day-school teacher is part of the office of the holy ministry, inasmuch as he 'labors in the Word and doctrine.'"

6. EVANGELICAL LUTHERAN JOINT SYNOD OF WISCONSIN AND OTHER STATES— CHRISTIAN DAY SCHOOL TEACHERS

Teachers in the Christian Day Schools of the Evangelical Lutheran Joint Synod of Wisconsin and Other States should be considered in exactly the same manner as is provided in such cases with regard to the Evangelical Lutheran Synod of Missouri, Ohio and other States.

7. JEWISH CONGREGATIONS—CANTORS

In an exceptional case, a Jewish congregation may have no ordained rabbi, but instead will accept as rabbi a person who lacks ordination. The person so engaged to act in the capacity of rabbi may be a cantor. In such an instance, the cantor performs virtually all of the functions normally performed by a rabbi, including the giving of advice upon specific questions of Jewish law, the preaching of sermons, the teaching and expounding of the law; and the congregation regards him as their spiritual leader. In such an exceptional case, the cantor may be considered a regular minister of religion.

8. VOLUNTEERS OF AMERICA

The commissioned officers of the Volunteers of America are duly ordained and commissioned after due preparation and a satisfactory examination. It also appears that these commissioned officers customarily preach and teach the principles of religion in accordance with the prescribed form of worship recognized by the organization. Therefore, they may be considered regular or duly ordained ministers of religion.

9. CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS (MORMON)

Those registrants who have been ordained in the Melchizedek Priesthood of the Church of Jesus Christ of Latter Day Saints (Mormon) and who are serving in any of the capacities hereinafter listed, may be considered regular ministers of religion within the meaning of the Act and the Regulations, so long as they hold any of these positions:

- (a) The first presidency of three men.
- (b) The presiding patriarch or quorum of twelve apostles.
- (c) The first seven presidents of seventies.
- (d) The presiding bishopric of the church of three men.
- (e) The president and two counselors of each stake.
- (f) The bishop and two counselors of each ward.
- (g) The president and two counselors of each independent branch.
- (h) The president of each dependent branch.
- (i) The president of each mission.
- (j) Those men who have been ordained as elders of seventies and who hold formal certificates as missionaries.

10. SEVENTH-DAY ADVENTIST CHURCH COLPORTEURS AND DAY SCHOOL TEACHERS

Members of this church consider their colporteur evangelistic work to be of highest importance in the propagation of the faith. They look upon the men who do this work

as engaged in a vocation comparable to the gospel ministry, even though they are not ordained. When a registrant is found to be actually engaged in a bona fide manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials, he may be considered a regular minister of religion.

The teachers in the day schools of this church are looked upon by members of the denomination as engaged in sacred work comparable to that of the gospel ministry. They are the religious instructors of the children and youth of the church, and even though they are not ordained, they have given their lives and are devoting their time to the religious activities of the church. Such teachers may be considered regular ministers of religion.

[signed] Lewis B. Hershey
DIRECTOR

Letter, January 27, 1942

LETTER

LAW OFFICES OF
HAYDEN COVINGTON

117 ADAMS STREET - BROOKLYN 1 - NEW YORK

January 27, 1942.

Lt. Col. Carlton S. Dargusch,
Deputy Director,
Selective Service System,
Washington, D. C.

Dear Colonel Dargusch:

Your letter January 13, file 1-1.13-77, re "Pioneers of Jehovah's witnesses"

Due to the fact that I have been away from the office on an extensive trip to various parts of the country, diligent and prompt answer was prevented to your letter concerning the course of study in the Bible and Bible helps prescribed by the Society with respect to persons admitted to pioneer status by said Society. I have taken the matter up with the Society and they advise:

No specified educational background is required of any individual precedent to admission to the pioneer ranks. However, the Watchtower Bible and Tract Society has provided eighteen and more volumes and publishes the semi-monthly magazine The Watchtower, dealing with doctrinal and prophetic teachings of the Bible and those enrolling are required to have made a thorough study of these and subscribed to such teachings before they are accepted for pioneer service.

The Society maintains "companies", which might be called branch schools, in thousands of towns and cities throughout the United States, under the immediate direction of competent instructors, elders, ministers and "servants", duly appointed by the Society, who regularly, not less than twice each week of the year, give instruction in the Bible. Each session of study is not less than one hour. This is done through conducting studies in the various publications above referred to, together with the Bible.

All persons who have covenanted to do the will of Almighty God and who have been acquainted with or who desire to become acquainted with the prophecies of the Bible, as revealed through the publications of the Society, are invited to and do attend such studies. They are permitted to receive instructions at such "companies" or "schools" above referred to.

Each applicant for pioneer work has attended one or more of these schools for a satisfactory length of time.

One desiring to enter the pioneer ranks must submit an application providing the Society with certain information, showing whether he is a student of the Watchtower magazine and the publications of the Society, for what length of time, whether he is entirely in accord with the explanations of the Bible therein contained and provide other evidence showing how long he has been connected with the local "company" of Jehovah's witnesses and in attendance at such "schools".

If, from such application, the Society is not convinced of the qualification of the applicant in that regard, a further investigation is conducted through the "company servant" and study conductors in charge of the local "company" or "school", before passing on the application.

No specified time is required in study and preparation because of the varying ability of the different ones. The Society, as such, does not maintain so-called "divinity" schools in the manner conducted by the worldly religious institutions because it should be remembered that the Lord J sus Christ's apostle Peter and many other faithful ministers were not required to and did not attend divinity schools. The apostle Peter was trained as a fisherman until invited by the Lord J sus to engage in the "ministry" and he and the other apostles were referred to by the officials and religionists of that day as "unlearned and ignorant men". Acts 4:5-13.

To be "ordained" means to be appointed by the proper authority to a position or office to perform the duties specifically assigned. Jehovah's witnesses being selected by Jehovah God, it follows that he is the authority that ordains the servant, as it is written at Isaiah 61:1-3. That scripture states the commission of authority given by the Lord God to those persons. Since Jehovah's witnesses operate in a legal and orderly way through their corporate representative, the Watchtower Bible & Tract Society, Inc., they also receive the earthly ordination hereinafter referred to.

No diploma or certificate, as such, is issued by the "company" or "school" where the person attends. However, after being duly admitted to the pioneer rolls, and demonstrating sincerity and ability over a satisfactory period of time, the Society issues a certificate signed by the Superintendent of Evangelists of the Society, subscribed to before a Notary Public, a sample copy of which is attached hereto, when requested by the pioneer.

There is forwarded to all persons qualifying themselves to act as Jehovah's witnesses, including the pioneers, a printed identification card, containing the signature of the

Letter, July 7, 1943

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President of the Society, acting for the Society, certifying that the bearer is an ordained minister, a sample of which has been heretofore forwarded to you.

Sincerely,

[signed] Hayden Covington

LETTER

NATIONAL HEADQUARTERS SELECTIVE SERVICE SYSTEM

21ST STREET AND C STREET, N. W.

WASHINGTON, D. C.

July 7, 1943

IN REPLYING ADDRESS

THE DIRECTOR OF SELECTIVE SERVICE

AND REFER TO NO.

1-6.26-77

Mr. Hayden Covington
117 Adams Street
Brooklyn, New York

Dear Mr. Covington:

May I acknowledge receipt of your letter of June 19, the purpose of which was to recommend to me that I take summary action against Local Board No. 133, Brooklyn, New York. In your correspondence you have made an effort to establish proper grounds for my taking such action through an analysis of the policy of this Headquarters with regard to registrants who are members of Jehovah's Witnesses. The basis for your recommendation is that Local Board No. 133 has undertaken to reclassify from Class IV-D to Class I-A members of the Bethel Family of Jehovah's Witnesses. I hasten to advise you that the premises upon which you base your recommendation are

Letter, July 7, 1943

not consonant with our philosophy and our interpretation of the law, and I feel that we should make certain statements in this regard.

The Selective Service System is divided into two distinct branches which, for want of better terms, we will call operational and administrative. The operational branch of Selective Service consists primarily of the local board, boards of appeal, and Presidential appeal. The administrative branch of Selective Service consists primarily of National Headquarters and State Headquarters.

With regard to the operational branch, the Selective Training and Service Act of 1940 provides as follows:

"There shall be created one or more local boards in each county or political sub-division corresponding thereto of each State, Territory, and the District of Columbia. . . . Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

The operational branch of Selective Service has the power of determining classification of registrants affecting their inclusion for, or exemption or deferment from, training and service.

The administrative branch of Selective Service has no authority to classify individual registrants but rather promulgates rules and regulations prescribed by the President, and generally administers to the conduct of the Selective Service System as a governmental agency.

The Selective Service Act provides that regular or duly ordained ministers of religion shall be exempt from training and service but not from registration under the

Act. In Selective Service Regulations there is an assisting definition with regard to the terms "regular minister of religion" and "duly ordained minister of religion."

This Headquarters was advised that all persons adhering to the principles of Jehovah's Witnesses considered themselves as ministers of religion and, therefore, entitled to exemption. Local boards and appeal agencies, however, did not classify all Jehovah's Witnesses as ministers of religion. In due time the Watchtower Bible and Tract Society, through you, presented this matter for consideration of this Headquarters. You were informed of the opinion of this Headquarters that the Watchtower Bible and Tract Society and Jehovah's Witnesses could be considered as included under the phrase "recognized church, religious sect, or religious organization." You were, however, informed that this Headquarters did not agree that all persons subscribing to any religious belief could be considered as ministers since this was considered contrary to the normal concept and to our concept of ecclesiastical organization. We did feel, however, that Jehovah's Witnesses, being a religious organization, would be entitled to consider some of their members as ministers. We were willing to express this opinion to the Selective Service System and, in order that you might indicate a reasonable number of those who were recognized by your organization as ministers, you were privileged to submit a list of such persons to this Headquarters.

We received the list which you submitted and made it available to the Selective Service System. At the same time we promulgated National Headquarters Opinion No. 14 generally with regard to Jehovah's Witnesses as an organization and to its members with reference to the list which you had submitted and which was made available to the System. National Headquarters Opinion No. 14 is no more than its title implies, an administrative opinion of National Headquarters with regard to members of Jehovah's Witnesses. The official list of Jehovah's Witnesses is no more

Letter, July 7, 1943

than information from National Headquarters as to those members who, within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers. Contrary to your contention, this opinion and list do not constitute "settled principles of law" and do not erect a barrier beyond which the discretion of the local board cannot be exercised. A local board may, in any individual case, substitute its opinion for a general opinion of National Headquarters. Incidentally, and to answer your statement, local boards are not compelled to furnish legal foundations and detailed analyses of the reasoning leading to classification decisions.

Not only in the instant case, but in all cases of classification, information and opinions of National Headquarters bearing upon the classification of registrants are subject to a contrary determination by local boards and appeal agencies. Under the law there is no person, including the Director, who can make decisions of classification binding local boards on "questions or claims with respect to inclusion for, or exemption or deferment from, training and service." Upon such questions the decision of the local board, subject to appeal, is final. Administrative determinations of a purely procedural nature may bind local boards where they do not encroach upon the legal provinces of such boards.

Action may be taken by the administrative branch requesting reopening and reconsideration of a case, taking an appeal, postponing an induction, or requiring other similar action. This does not constitute a determination of the merits of a particular case but merely brings into play certain administrative procedures.

You may expect from this Headquarters a continued administrative consideration of your problems. We are willing to consider for administrative action any individual cases which you may desire to present and which warrant such procedures. We cannot, however, subscribe to your view that we have, by our opinion or by the official list,

deprived any of our local boards or appeal agencies of the authority to determine questions in instances where that authority resides in the local boards and appeal agencies under the provisions of the Selective Service Act.

Sincerely yours,
[signed] Lewis B. Hershey
DIRECTOR

LETTER

OF CONGRESSMAN MARTIN J. KENNEDY
APPEARING IN PRINTED "HEARINGS BEFORE THE COMMITTEE ON MILITARY AFFAIRS, HOUSE OF REPRESENTATIVES, SEVENTY-SIXTH CONGRESS, THIRD SESSION, on H. R. 10132; Pages 628-630

HOUSE OF REPRESENTATIVES
Washington, D.C., August 7, 1940.

MILITARY AFFAIRS COMMITTEE,
House of Representatives.

GENTLEMEN: To me it seems imperative that action be taken by your committee to insure that the Wadsworth bill be so modified as to make due provision for the religious life of the American people. As you know the sole provision of the bill in this matter is the President's right to defer the service rendered by ministers of religion actually engaged in ministerial duties. No provision is made for those who are preparing for the ministry: seminarians. Nor is any provision made for those indispensable members of a religious community, whose duties it is to attend to the domestic work of the religious house—the coadjutor brothers. These men make it possible for priests to attend to their proper work.

To me it seems clear that the good of the American

people requires that all these classes—clergymen, seminarians, and Brothers—be exempted from service under the bill.

Many reasons why this statement is true must occur to your mind; let me mention those which seem of weight to me. I shall not offer arguments which might appeal to my coreligionists, but such as must weigh with every thoughtful American.

It is evident to intelligent observers that religion is the backbone of all moral conduct; religion supports authority, teaching respect for law and order. Principles derived from religious moral teaching make the average man an honest man, a law-abiding citizen. Teaching, for example, that God forbids murder under threat of eternal punishment, religious instructors have proposed a motive for avoiding this crime far in excess of any which the state can assign or carry out; and so also of all other crimes. It is, therefore, good public policy to provide for the continued and flourishing existence of religion; I do not, of course, suggest any link with any particular form of religion but an even-handed dealing with all religious bodies.

Religion is one of the needs and demands of the American people. In fact, the bill under discussion may be said to recognize this need since it makes some effort to provide for religious ministers. The precise point is that the provision of this bill in this respect is not adequate.

Granted that religious ministers are to receive some consideration under this bill, consistency and thoroughness require that this consideration (1) amount to total exemption from training and service, and (2) be extended not only to ministers already ordained, but also to the two groups mentioned above, seminarians and Brothers.

Let me take the three points that here suggest themselves in order:

1. Total exemption of ordained clergymen.
2. Total exemption of seminarians.
3. Total exemption of Brothers.

1. Total exemption of ordained clergymen. The American people enjoy the right to exercise freely their right to worship. To do this adequately, each religious group requires and desires that it be possessed of a group of trained religious educators and leaders known as the clergy. The principle, therefore, that each man should serve where he will do the most good and best further his country's interests in time of war requires that in time of war the clergy remain clergy. That is their specialty. There they are most efficient. There they are most needed. It is a well-known adage that "without hope the people perish." And truly this is especially manifest in time of war when the buoyant and hopeful solution of life given by religion alone suffices to lift up fainting spirits.

2. Total exemption of seminarians. The public need for a properly trained clergy already described is a permanent thing, lasting as long as there endures the ineradicable tendency in man toward higher things. To satisfy this permanent need, a continuous stream of trained religious leaders must be entering upon their work. This cannot be if we do not permit our seminaries to continue their normal functioning. For where are we to find our future ministers of religion if not in seminaries? It must be clear that if you take away the seminaries of today you take away the priest, minister, or rabbi of tomorrow. And whether the morrow bring peace or war, we can ill afford to lack spiritual leaders, be they chaplains to encourage and befriend our soldiers or be they pastors who instruct and serve our people.

But it may be objected that there is no intention under the bill of destroying the seminarian class, that all that is required is a temporary interruption of the course pursued by the seminarian. To this objection, let me answer, first that such an interruption of a full year in the midst of a course of study which of its nature is continuous and closely linked would be an immense set-back in the progress of the seminarian toward his goal. Secondly, and this response

is more basic, the objection misses the whole point at issue. That point is precisely this: The seminarian is destined to serve the people as a clergyman, whether in peace or in war. Hence any training of him for other work is a needless waste of time and money.

The measure to be taken, therefore, is one recognizing the principle that an adequate clergy group is a really fundamental necessity in time of war and hence, parallelly, an adequate seminarian group is a real necessity in time of preparation. No bona fide seminarian should be shunted off the course he has entered upon and drafted into some other field of public service, thus deserting the line for which he is best adapted.

This leads us to another seeming objection to my proposal, which, in fact however, has no weight. That is the objection that spurious seminaries and seminarians will suddenly appear all over the country in order that conscription be evaded. Even if some less spirited youths might be tempted to try this ruse, is it not clear that a little careful examination of each institution will quickly reveal which are genuine seminaries containing sincere seminarians and which are so-called seminarians containing opportunists? For, surely, it is a matter of public record in each locality which seminaries have been in existence for a term of years before the war scare sufficient to prove that avoidance of military service had nought to do with their existence. Again, the records of these seminaries will reveal the average number of entrees each year. Only if the number this year notably exceed that of recent years may suspicion be cast on the genuine good intentions of those entering this year.

3. Total exemption of Brothers. We may distinguish two types of Brothers; viz: those who directly serve the people at large for example by teaching, and those who do so indirectly, namely, by directly serving priests or other religious who in turn serve the people directly. I contend that both classes should be totally exempted from military

service and training. This exemption is due to the first class—those who serve the people at large directly—because their functions are necessary both in peace and war. Let us consider the offices performed by the second group a little more closely. These men do the manual work necessary in religious communities and institutions. Their ministrations, given freely, are absolutely necessary, if the priests are to be free to attend to their special work. Hence, the arguments which prove the need of clergy prove likewise the need of these relatively few, but very important members of religious communities. They also ought, therefore, to be exempted.

I hope my suggestions will receive the favorable consideration of the committee.

I would be pleased to have this letter included in the hearings.

Respectfully submitted.

MARTIN J. KENNEDY

EXCERPTS

from Appellee's Brief *Benesch v. Underwood*

Excerpts from Brief of the Appellee in *Benesch v. Underwood*, No. 9271, United States Circuit Court of Appeals for the Sixth Circuit. At page 15 of that brief, footnote 9, *inter alia*, reads:

"The list at National Headquarters was established for the reasons set forth in General Hershey's opinion of June 12, 1941 (R. 14-18), i. e., primarily, because (R. 15) 'The unusual character of organization of Jehovah's witnesses renders comparison with recognized churches and religious organizations difficult.'"

Quoting from pages 17 and 18 of the brief:

"Again, while ministers are exempt from training and service, the decisions of the local draft boards on all claims for exception are, by statute, made final, subject only to review by appeal boards established in accordance with the Act. Consequently, the inclusion of Benesch's name on the list of 'Pioneers' maintained at National Headquarters would not, *ipso facto*, entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local board. Consequently, assuming, *arguendo*, that National Headquarters may have been persuaded by the local board's letter to exclude his name, that fact may not be said to have been unfair or prejudicial to Benesch."

SPECIAL PROBLEMS OF CLASSIFICATION

[From *Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42, pages 239-241]

Statutory Exemption of Ministers and Theological Students

Freedom to worship is one of the four freedoms for which we fight. Even in days before we realized that our civilization was to be challenged, even to its religious roots, it was felt that regular and duly ordained ministers should be exempted from military duty. There was a natural repugnance toward any proposal for drafting ministers of religion for training and service. The first bill submitted to the Congress contained this provision and was readily accepted. . . .

What is Ordination?

In some of the churches this is a sacrament attended by very elaborate ceremonies which follow prolonged periods of philosophical and theological training and acceptance by a bishop; in other cases it is the simplest ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme. The question of fact of whether a person was a minister was difficult at times in such groups as the Jehovah's witnesses, but we need not here enter in any detail into that discussion. . . .

As to who constitute regular ministers of religion, a very broad definition of this vocation was formulated for those charged with Presidential appeals as follows:

"The ordinary concept of 'preaching and teaching' is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither loca-

tional nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message 'from housetops' or write it 'upon tablets of stone'. He may give his 'sermon on the mount', heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. He may carry his message with the gentleness of a Father Damien to the bedside of the leper, or hurl ink-wells at the devil with all the crusading vigor of a Luther. But if in saying the word or doing the thing which gives expression to the principle of religion, he conveys to those who 'have ears to hear' and 'eyes to see', the concept of those principles, he both preaches and teaches. He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion.

"But to be a 'regular minister' of religion he must have dedicated himself to his task to the extent that his time and energies are devoted to it to the substantial exclusion of other activities and interests. He cannot 'serve God and mammon' and lay claim to a status as a 'regular minister'. To be a 'regular minister' of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant."

Wide Interpretation of Who are Ministers of Religion

The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's witnesses, who sell their religious books, and thus extend the Word. It includes lay brothers in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion. . . .

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No. 1201

66

In the Supreme Court of the United States

OCTOBER TERM, 1944

LOUIS DABNEY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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LOUIS DABNEY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 29, 1944, petitioner was released from the Army pursuant to a writ of habeas corpus issued by the United States District Court for the Eastern District of South Carolina on the ground that he had been unlawfully inducted into the Army on September 30, 1943 (see *infra*, pp. 3-4). Thereafter, in November 1944, he was indicted in that court in one count charging that he failed to report for induction on September 30, 1943, as ordered by his local board, in violation of Section 11 of the Selective Training and Service Act (50 U. S. C. App. 311) (R. 2-3). He was convicted by a jury (R. 41) and was sen-

tenced to imprisonment for three years and six months (R. 1).¹ Upon appeal to the Circuit Court of Appeals for the Fourth Circuit the judgment was affirmed (R. 60-68).

The facts may be summarized as follows:

Having been classified I-A (available for military service) by the Selective Service System (R. 7), petitioner, on September 18, 1943, was ordered by his local board to report for induction (R. 6). The order (R. 43-44) directed petitioner to report to his local board at Columbia, South Carolina, at 8:30 a. m. on September 30, 1943, and it recited that the local board would furnish transportation to an induction station, where petitioner would be examined and, if accepted, inducted. Petitioner testified that he received the order (R. 20, 50) and that he had no intention of complying with it (R. 20, 23, 51). Petitioner's father knew that he intended to disobey the board's order, so he hired a local magistrate and two of his deputies to take petitioner to the induction station on September 30 (R. 21-23). On the morning of September 30 it was petitioner's admitted intention to disregard the order of his local board and, instead, to surrender himself to the United States Commis-

¹ This sentence is subject to the special parole provisions contained in Section 10 (a) (6) of the Selective Training and Service Act (50 U. S. C. App. 310 (a) (6)) and Executive Order 8641 (6 Fed. Reg. 563), pursuant to which the Attorney General is authorized to parole any person convicted for violation of the Act, either to the armed forces or to a Civilian Public Service Camp.

sioner (R. 20, 50). Some time between 8:00 and 9:00 o'clock that morning (see R. 13, 21, 54-55), petitioner was in his home shaving (R. 11) when the three officers hired by his father appeared and by a show of force compelled him to accompany them to the induction station (R. 11-12). Petitioner was given a physical examination and was then asked to state his preference as between service in the Army or Navy (R. 14-15). He testified, "I replied that I chose neither, that I was a minister of the Gospel and I was exempted from military service" (R. 15); "I explained that I was brought out there against my will, and I explained that I was a minister and could not be inducted into the Army" (R. 15). Petitioner told the authorities at the induction station that he "wanted to be released" (R. 16). Although he refused to undergo the induction ceremony (R. 16), he was told that he was in the Army and was given a three-week furlough (R. 16-17). He reported back at the conclusion of the furlough (R. 17), but upon his refusal to wear the uniform of a soldier, he was court-martialed and sentenced to imprisonment for twenty-five years (R. 18-19).

On December 9, 1943, prior to the court-martial proceeding, a petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of South Carolina, seeking petitioner's release from the Army on the ground that he had been forcibly inducted over his objection and that, as a Jehovah's Witness, he was a

minister of religion and had been arbitrarily denied exemption as such by the Selective Service System. The writ issued, a hearing was had, and the court thereafter entered an order denying the petition. Petitioner appealed to the Circuit Court of Appeals for the Fourth Circuit and, while that appeal was pending, this Court rendered its decision in *Billings v. Truesdell*, 321 U. S. 542. In conformity with that decision, the respondent consented to reversal of the judgment of the district court and petitioner was thereafter released from military custody.²

The district court's opinion in the habeas corpus case (see also Pet. 6) states that on January 29, 1943, petitioner filed his questionnaire with his local board, claiming that he was a conscientious objector and a minister of religion, but that he later withdrew the claim that he was a conscientious objector. In the questionnaire petitioner stated that he was then 18 years of age, that he was a student at the University of South Carolina, majoring in engineering, and that he intended to take an examination for a license in engineering. He also stated that he had been a minister of religion since 1938, when he was 13 or 14 years of age. The opinion further states that

² These facts as to the disposition of the appeal appear from the order of the district court, entered upon the mandate of the circuit court of appeals, discharging petitioner from military custody. The text of that order is set forth in the Appendix, *infra*, pp. 9-10.

petitioner had been given several hearings before the local board, that the board members had no prejudice against him or his religious sect, and that full consideration was given his evidence. (See *Smith v. Richart*, 53 F. Supp. 582; Pet. 8-9; R. 19.)

Petitioner urges here (Pet. 12-17, 20-31), as he did in the circuit court of appeals (see R. 62-63), (1) that he was kidnapped and falsely imprisoned at the time he was required to report to the local board for transportation to the induction station and that it was therefore impossible for him to report to the board; and (2) that because his abductors took him to the induction station he must be treated as having reported for induction in compliance with the order of the local board.³ As

³ Compare, however, the following statement in petitioner's brief in the district court in the habeas corpus proceeding:

"It was amply proved that he [petitioner] was carried to the induction station under compulsion by three men, at least one of whom was armed. The father of the boy admitted that the abduction was 'arranged by him.' There is no question but that he did not go of his own accord.

"He was ordered by the local board to report to the board to be sent to the induction station for induction. He did not report but was carried directly to the induction station by armed men at the instance of his father and delivered to the military authorities.

"That illegal action was jurisdictional and rendered all subsequent proceedings void. The law itself provides in Section 11 the penalty for failure to report, the penalty being, not forcible delivery or induction, but trial in the district court. That is all that can be done. * * *

we have shown, petitioner secured his release from the Army on the ground that he chose to defy the order of the local board and to subject himself to prosecution in the civil courts rather than submit to induction. We believe that the lack of merit in his present contentions is clearly demonstrated by the opinion of the court below. That opinion fully discusses petitioner's arguments (R. 61-63) and shows beyond question that petitioner did not in fact report for induction, and that the acts of the magistrate and his deputies bore no proximate relation to petitioner's failure to comply with the order of the local board, but instead made it possible for him to comply by submitting to induction. Accordingly, we deem it unnecessary to reargue in this memorandum the various considerations which the court below advanced in support of its judgment.*

* Petitioner's contention (Pet. 15-17) that he was entitled collaterally to attack his Selective Service classification as a defense in the criminal prosecution for failure to report for induction, is substantially the same as the argument urged by petitioner's counsel upon petitions for writs of certiorari in *Flakowicz v. United States*, No. 1072, and *Rinko v. United States*, No. 1071, certiorari denied, April 30, 1945. For the Government's argument in opposition to the contention that the Selective Service classification may be collaterally challenged in the criminal trial, the Court is respectfully referred to our briefs in those cases. In any event, as the circuit court of appeals pointed out (R. 67), petitioner tendered nothing to show that the classifying agencies of the Selective Service System transcended their jurisdiction or acted arbitrarily or unreasonably in classifying petitioner I-A.

Petitioner also urges (Pet. 32-33) that "the trial court erred in charging the jury that petitioner's appearance at the induction station and acceptance by the armed forces, as well as petitioner's contentions that he was falsely imprisoned, were immaterial and in refusing the requested charges which properly presented these issues to the jury." He cites no supporting record references (see Rules 27 and 38 of the Rules of this Court), and our examination of the court's charge (R. 28-41) reveals no such defect in it. Rather, the charge fully and fairly covered the issues in the case. Not only did the court not give the instructions which petitioner contends were erroneous, but also the court specifically instructed the jury in the manner in which petitioner claims it should have. In this respect the court instructed the jury (R. 32):

Now, something has been said in this case about the defendant being restrained. I charge you that a person who is required to do something, if he is prevented from doing that through no fault of his own, if some outside force which he cannot control intervenes to prevent him from performing his duty, that would be a good defense so long as the restraint exists, but it would not relieve of the duty and responsibility of performing said duty when the restraint was removed.

Now, it is a question of fact for you in view of all of the testimony in this case,

the testimony of the defendant and the testimony of the other witnesses, as to whether or not any physical restraint had anything to do with his not reporting for induction.

In other words, if it is my duty to go down in front of this Court House at a given hour, and before and at the time it is my duty to go I have no intention of doing so and would not do so, the mere fact that somebody may have laid hands on me and held me temporarily might have nothing in the world to do with my absence in front of the Court House where I was supposed to go, but if it did, if I decided that I would not go, and then changed my mind and decided I would go, then my duty called me there as soon as that restraint was removed.

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.

TOM C. CLARK,
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ROBERT S. ERDAHL,
IRVING S. SHAPIRO,

Attorneys.

MAY 1945.

APPENDIX

In the United States District Court for the Eastern District of South Carolina, Columbia Division

Order C. A. 1100

LILA SMITH, PETITIONER,

v.

D. G. RICHART, AS COLONEL UNITED STATES ARMY
AND COMMANDING OFFICER OF FORT JACKSON,
RESPONDENT

This case comes on for further proceedings in accordance with the mandate of the United States Circuit Court of Appeals for the Fourth Circuit, reversing the judgment of this Court by agreement of the parties, because the case comes within the rule announced by the United States Supreme Court in its decision filed March 27, 1944, reversing the judgment of the Tenth Circuit Court of Appeals in the case of Arthur Goodwyn Billings v. Karl Truesdell, etc., filed after the judgment of this Court had been rendered on February 1, 1944. Now, therefore, in accordance with the foregoing,

It is ordered and adjudged as follows:

1. That the petition for writ of habeas corpus filed by the petitioner to obtain the release of Louis Dabney Smith, Jr. from the military stockade at Fort Jackson, South Carolina, be and the same is hereby granted upon the ground that he is not now subject to military law, and the said

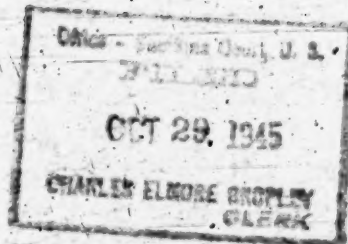
court martial proceedings against him are therefore null and void for lack of jurisdiction.

2. That the imprisonment and detention of the said Louis Dabney Smith, Jr. by the respondent herein is illegal and without authority of law, and he is hereby ordered to be released and discharged therefrom.

(Signed) C. C. WYCHE,
United States District Judge.

Dated: Spartanburg, S. C., April 29, 1944.

FILE COPY



No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1945

LOUIS DABNEY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 66.

LOUIS DABNEY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION² BELOW

The opinion of the circuit court of appeals (R. 56-63) is reported at 148 F. 2d 288.

JURISDICTION

The judgment of the circuit court of appeals was entered April 4, 1945 (R. 64). The petition for a writ of certiorari was filed April 25, 1945 and was granted May 28, 1945 (R. 67). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules

XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain petitioner's conviction for failing to report for induction as directed by his local board.
2. Whether petitioner's claim in the trial court that his local board denied him classification as a minister because of prejudice against Jehovah's Witnesses is sufficient to present the question of the propriety of his final classification, which was made by the Director of Selective Service, acting for the President.
3. If so, whether petitioner was entitled to challenge the propriety of his selective service classification in his criminal trial.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set forth in Appendix A, *infra*, pp. 57-60. The Selective Service Regulations and the Army Regulations, are set forth, in pertinent part, in Appendix B, *infra*, pp. 61-91.

STATEMENT

In November, 1944, petitioner was indicted in the United States District Court for the Eastern District of South Carolina for violation of the Selective Training and Service Act of 1940. The

indictment (R. 2-3)¹ alleged that on September 30, 1943, petitioner knowingly and willfully failed to perform a duty required of him under the Act and the Selective Service Regulations in that he refused to report for induction as ordered by his local board. At his jury trial, petitioner sought to challenge the classification given him by his local board, but the court excluded the proffered evidence (R. 9-11; see *infra*, p. 29) and instructed the jury that petitioner's classification was not in issue (R. 33). He was convicted (R. 41) and was sentenced to imprisonment for three years and six months (R. 1).² Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment was affirmed (R. 56-64).

The facts may be summarized as follows:

It appears from the findings of the court in *Smith v. Richart*, 53 F. Supp. 582 (E. D. S. C.), a habeas corpus case involving petitioner, that he

¹ For convenience, we shall refer to the printed transcript of record, which consists of the appendices to the briefs of the parties in the circuit court of appeals and the proceedings in that court, as "R." and to the typewritten transcript of the evidence at the trial as "Tr."

² This sentence is subject to the special parole provisions contained in Section 10 (a) (6) of the Selective Training and Service Act (50 U. S. C. App. 310 (a) (6)) and Executive Order 8641 (6 Fed. Reg. 563), pursuant to which the Attorney General is authorized to parole any person convicted for violation of the Act to the armed forces, to a Civilian Public Service Camp, or for special service work established by the Attorney General.

is a member of the sect known as Jehovah's Witnesses. He registered with his local board, and on January 29, 1943, he filed his questionnaire with the board, claiming exemption from all military service on the ground that he was a conscientious objector and a minister of religion.^a "In his questionnaire he stated that he was eighteen years old; that he was a student at the University of South Carolina, majoring in Engineering, preparing for a B. S. degree, and intended to take an examination for a license in Engineering. He also stated that he was not a student preparing for the ministry in a theological or divinity school; that he had been a minister of Jehovah's Witnesses since September, 1938; that he had been formally ordained scripturally as shown by certain verses in Luke, John and Isaiah. He was living with his father, had always received his support, maintenance and education from his father, and no steps had been taken to remove the disability of minority, or to emancipate him from parental custody and control.

"On April 2, 1943, the Local Draft Board placed him in 1-A. The classification was appealed to the Board of Appeal on May 25, 1943, and was affirmed. On June 22, 1943, he appealed from the decision of the Board of Appeal to the President of the United States. His classification was again affirmed." See 53 F. Supp. 583-584.

^a His conscientious objector claim was later withdrawn (see Gov. Ex. 1).

On September 18, 1943, petitioner was ordered by his local board to report for induction (R. 6). The order (R. 43-44) directed petitioner to report to his local board at Columbia, South Carolina, at 8:30 A. M. on September 30, 1943, and it recited that the local board would furnish transportation to an induction station, where petitioner would be examined and, if accepted, inducted. Petitioner testified that he received the order and that he had no intention of complying with it (R. 20; 48). His father, who is not a Jehovah's Witness (Tr. 50), knew that he intended to disobey the induction order, and so he hired a local magistrate and two deputies to take petitioner to the induction station on September 30, 1943 (R. 21-23).

On the morning of September 30, the day on which he was to report for induction, it was petitioner's admitted intention to disobey the induction order and, instead, to surrender himself to the United States Commissioner (R. 20, 48). The evidence as to time is conflicting, but at some time between 8:00 and 9:00 o'clock that morning (see R. 13, 21, 50-51; *infra* p. ²² 8) petitioner was in his home, which is about two miles from the office of his local board (Tr. 43), when the three officers hired by his father appeared and compelled him to accompany them to the induction station at Fort Jackson (R. 11-12). The officers surrendered him to a sergeant at the induction station, to whom petitioner immediately stated that

he was a minister of the gospel, that because his local board was prejudiced against him, the board refused to classify him as a minister, and that "I was not to be inducted into the Army" (R. 13). The sergeant ascertained from petitioner's local board that he was supposed to be inducted that day, and he directed petitioner to await the arrival of other registrants from his board (R. 13-14). When they arrived, the roll was called and petitioner answered "present" when his name was reached (R. 14). He underwent a physical examination, together with the other registrants (R. 14-15), after which he was asked to state his preference as between service in the Army and the Navy (R. 15). Petitioner testified that "I replied that I chose neither, that I was a minister of the Gospel, and I was exempted from military service" (R. 15); "I explained that I was brought out there against my will, and I explained that I was a minister and could not be inducted into the Army" (R. 15). Following this, petitioner was fingerprinted and questioned concerning his home, name, family, and occupation (R. 15), and was then taken, with the other registrants, to another building for the induction ceremony (R. 16). In compliance with the instructions of the sergeant in charge that anyone who did not want to take the oath should raise his hand and step aside, petitioner indicated that he desired not to take the oath, and he stepped aside from the other regis-

trants (R. 16). Petitioner was told that regardless of whether he subscribed to the oath, he was in the Army, and after the Articles of War had been read, the entire group was granted leave for twenty-one days (R. 17). Petitioner reported back when his leave expired, and he explained to the officer in charge at the reception center "that I was a minister of the gospel and, according to the Draft Law ministers of the Gospel were exempted from military service, and I knew that members of the Local Board were prejudiced against witnesses of Jehovah" (R. 18). Thereafter petitioner steadfastly declined to wear the uniform of a soldier, as a result of which he was court-martialed and sentenced to imprisonment for twenty-five years (R. 18-19).

On December 9, 1943, prior to the court-martial trial, a petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of South Carolina, seeking petitioner's release from the Army on the ground that he had been forcibly inducted over his objection and that, as a Jehovah's Witness, he was a minister of religion and had been arbitrarily denied exemption as such by his local board. The writ issued, a hearing was had, and the court thereafter entered an order denying the petition. The court found that petitioner's classification was not invalid for any reason and that he was properly inducted into the Army. Petitioner appealed to

the Circuit Court of Appeals for the Fourth Circuit, and, while that appeal was pending, this Court rendered its decision in *Billings v. Truesdell*, 321 U. S. 542. In conformity with that decision, the respondent consented to reversal of the judgment of the district court because petitioner had not undergone the induction ceremony (*infra*, pp. 93-94), and petitioner was thereafter released from military custody. (*Smith v. Richart*, 53 F. Supp. 582; see R. 19.)

SUMMARY OF ARGUMENT

I

• The order to report for induction which petitioner received included a command that he submit to induction. *Billings v. Truesdell*, 321 U. S. 542, 557. The conceded fact that petitioner knowingly refused to submit to induction thus established that, as charged in the indictment, he failed to perform a duty required of him by the Selective Training and Service Act and the Selective Service Regulations. But petitioner did more than fail to submit to induction. He neither reported to the local board nor to the induction station. Since it is undisputed that petitioner never intended to report to his local board, and since the intervening coercion practiced by the

three men hired by his father was not directed to preventing him from complying with the induction order, the defense of compulsion is inapplicable. While petitioner found himself at the induction center, it cannot be said that he complied with the order of his board by reporting there. For he was forcibly brought there against his will; he did not present himself for induction as the induction order contemplated; and after being brought there his refusal to be inducted persisted.

II

Petitioner's I-A classification was made *de novo* on his appeal to the President. Thus, to establish the impropriety of the classification, assuming that this defense was open to him in his criminal trial, he bore the burden of showing that the Director of Selective Service, acting for the President, acted otherwise than according to law in classifying him. But he tendered no such evidence. Rather, it appears that he sought to show at his trial that his local board was prejudiced against Jehovah's Witnesses and that it therefore denied him classification as a minister of religion. In the circumstances, this evidence was immaterial and the trial court properly excluded it. *Bowles v. United States*, 319 U. S. 33.

III

Petitioner was not entitled to assert as a defense to a prosecution for failure to comply with an order to report for induction that his classification was improper. The court below properly held that the case was governed by *Falbo v. United States*, 320 U. S. 549. Petitioner's argument that the cases differ in that he had reached the point in the selective service procedure where his acceptability to the Army had been ascertained, while Falbo withdrew from the process at an earlier point, may be conceded, but the distinction, we submit, does not demand the application of a different rule in this case. In both cases the selective service procedure was disrupted before the defendant had fully complied with the induction order of his local board. Petitioner was obliged unfailingly to obey his induction order. After induction, he would have been free to test the legality of his classification by resorting to habeas corpus, without either the time-consuming delays of a criminal proceeding or the prospect of serving a prison sentence instead of serving in the armed forces if he failed to prove that the order was unlawful.

ARGUMENT

The Selective Service Procedure Involved.—
The Selective Service procedure in force when

petitioner was classified and ordered to report for induction is as follows:

The procedure begins with registration, and induction marks its end. The initial step after registration is the registrant's receipt (if he is between the ages of 18 and 45), filling out, and return to the local board of the questionnaire. The registrant is entitled to present all written information which he believes necessary to assist the local board in determining his classification; this information is to be included in or attached to the questionnaire. (Reg. 621.4.)

Upon receipt of the questionnaire, the local board proceeds to classify the registrant solely upon the basis of the written information in his file (Reg. 623.1, 623.2). Unless placed in certain deferred classes, the registrant is then physically examined by local board examining physicians (Reg. 623.31).⁵ Thereafter, the registrant receives a notice of the classification by the local board (Reg. 623.61). Upon receipt of such notice, the registrant may, upon written request within

⁴ The procedure as it existed when petitioner was ordered to report for induction was in all material respects the same as that which was involved in *Falbo v. United States*, 320 U.S. 549.

⁵ In January 1914, the selective service procedure was changed to provide instead, for a preinduction physical examination at the induction station. See *Billings v. Truesdell*, 321 U.S. 542, 554-555.

ten days, ask for an appearance before the local board (Reg. 625.1). If request is made, time for appeal is stayed (Reg. 625.2 (e)), and the local board must send a notice of time and place for the appearance, at which the registrant may submit such additional information and make such additional presentation as he wishes. All such information must be reduced to writing and placed in the registrant's file (Reg. 625.2).

If the registrant's requested classification is denied, he may appeal (Reg. 625.2 (e), 627.2 (a)). In addition, the Director of Selective Service, the State Director of Selective Service, or the government appeal agent may also appeal from the local board determination (Reg. 627.1 (a), 627.2 (a)). The appeal results in a *de novo* consideration by the appeal board. Appeal is taken by filing a written notice, or by signing the "Appeal to Board of Appeal" upon the questionnaire (Reg. 627.11); the registrant may attach to his appeal a statement of the respects in which he believes the local board erred, may direct attention to any information in his file which he believes the local board failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which that board failed or refused to include in his file (Reg. 627.12). If the information is not sufficient to enable the appeal board to determine the registrant's classification, the file is

returned to the local board with proper instructions (Reg. 627.23). Before transmitting the file to the appeal board the local board must first summarize in writing all unwritten evidence which was before it and in doing so it "should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision" (Reg. 627.13 (a)). The taking of appeal automatically stays induction (Reg. 627.41).

The appeal board then makes its classification and returns the case to the local board (Reg. 627.26, 627.27), which notifies the registrant of the appeal board's action (Reg. 627.31). The decision of the appeal board may, however, be subject to further appeal upon certain conditions. Appeals as of right to the President may be taken by the registrant in any case where he is classified as available for military service (I-A) or as a conscientious objector (I-A-O or IV-E) and one or more members of the board of appeal dissented from the classification (Reg. 628). In addition, in any other case, the State Director of Selective Service or the Director of Selective Service may appeal, if either "deems it to be in the national interest or necessary to avoid an injustice" (Reg. 628.1). If such appeal is taken, the registrant is notified; he is also notified of the President's decision (Reg. 628.4 (a), 628.6). Appeal to the President stays induction (Reg. 628.7).

If the registrant is classified I-A, and his order number is reached, he is sent an Order to Report for Induction (Reg. 633.1). Section 3 (a) of the Act, however, expressly provides that—

* * * no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: * * *

Accordingly, the registrant is, upon reporting at the induction station, subjected to a final physical and mental examination. Only the selected men who are found acceptable in the examination are enabled to undergo the induction ceremony (Reg. 633.9). Inducted men who so desire are given an opportunity to return home for three weeks to arrange their affairs. Registrants who have been rejected are informed of the reason for their rejection and furnished transportation to their local board. (Army Reg. 615-500, sec. II, par. 13 (e)-(g) and par. 16 (a)-(c).) Upon receiving notice that a registrant has been found acceptable and has been inducted, the local board places him in class I-C; if he is not accepted because of unfitness, he is placed in IV-F (Reg. 633.13; see Reg. 633.10 (c)). It is not until after this step is taken that the Selective Service classification is complete.

The Issues Presented.—Petitioner's contentions in the trial court were twofold. Principally, he urged that he had no duty under the Selective Training and Service Act, because the induction order was founded on an arbitrary classification by his local board denying him exemption from service under the Act as a minister of religion. His effort to adduce proof calculated to show that he was a minister of religion was rejected by the court and, as a result, his main contention in the circuit court of appeals and in this Court is that, in defense of the allegations of the indictment, he was entitled to show that he had been improperly classified. Petitioner also urged in the trial court, as he does on appeal, that he did not, in fact, fail to comply with the induction order of his local board because the compulsion exercised over him by the local police, acting at his father's behest, excused his failure to report to his local board and, in any event, because he substantially complied with the board's order when the police brought him to the induction station to which he would have been sent if he had reported to his local board. Thus, stated broadly and in inverse order to that just indicated, the issues posed by petitioner are (1) the sufficiency of the evidence to show that he unlawfully failed to report for induction and (2) the correctness of the trial judge's ruling that a selective service registrant may not challenge the propriety of his Selective

Service classification in his criminal trial for failing to comply with an induction order.

I

THE EVIDENCE AMPLY DEMONSTRATES THAT PETITIONER KNOWINGLY FAILED TO PERFORM A DUTY REQUIRED OF HIM BY THE SELECTIVE TRAINING AND SERVICE ACT AND THE SELECTIVE SERVICE REGULATIONS

The penal sanctions provided in Section 11 of the Selective Training and Service Act extend to any person "who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or the rules or regulations made pursuant to this Act" (*infra*, pp. 59-60). In the words of the statute, petitioner was indicted for knowingly failing to perform a duty, in that he failed to report for induction as ordered by his local board. It was established at the trial, *inter alia*, that petitioner previously had secured his release from military custody on the ground that he had refused to undergo the induction ceremony and, further, petitioner testified that he refused to submit to induction. The burden of petitioner's argument is that this evidence does not support the allegations of the indictment. He argues that the only wrongful act alleged in the indictment was his failure to present himself to his local board at the time fixed in the induction order and that the Government's case was inadequate in this respect. In the view we

take of this aspect of the case, to report for induction means to report for the purpose of performing those duties required of prospective inductees, including submission to induction, and one who is physically present but refuses to perform such duties is just as much a violator of his induction order as one who fails to report at all. In this phase of the argument, we shall discuss first the considerations in support of our construction of the nature of the order to report for induction, and secondly we shall show that even if a narrower construction is adopted the evidence was sufficient to support the verdict of the jury.

A. We are supported by the Selective Service Regulations and by the judicial construction of them in the view that an order to report for induction requires more than that the registrant shall merely present himself to his local board at the time fixed in the induction order. The order to report for induction which was sent to petitioner (R. 43-44) and which is a part of the Selective Service Regulations (*infra*, p. 61), advised him that he had been selected for military training and service, that he was to report to the local board, that the local board would furnish transportation to an induction station, and that "you will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces." From its terms, it is plain that the order contemplated

more than that petitioner should report to the office of his local board; its obvious purpose was to complete the last phase of the selective service procedure, by which a registrant may be made a part of the armed forces (see R. 26-27). This is implicit in this Court's characterization of the order to report for induction or for work of national importance as an order directing the registrant to report for the last step in the selective process (*Falbo v. United States*, 320 U. S. 549, 554). And it is the view which this Court took in *Billings v. Truesdell*, 321 U. S. 542, 557, when it had occasion to consider whether a refusal to submit to induction was a violation of the Act. In holding that it was, the Court pointed out that—

The order of the local board to report for induction includes a command to submit to induction.

As the Court noted, until recently that command was implicit in the order to report, but it is now explicit (see *infra*, pp. 85-86). Section 633.21 (b) of the regulations provides that in reporting for induction a registrant is obliged:

(1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction,

(3) *to appear at the place where his induction will be accomplished*, (4) *to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished*, (5) *to submit to induction*, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his return trip to the local board. [Italics added.]

And Section 633.22 makes clear the fact that a registrant who reports to his local board has reported only for delivery to the induction station and that to fulfill his obligations it still remains for him to report at the place of induction and, if he is accepted, to submit to induction.

Our position likewise finds support in *United States v. Collura*, 139 F. 2d 345 (C. C. A. 2), cited apparently with approval in the *Billings* decision (321 U. S. at 547, 557), in which the defendant was convicted under an indictment identical in its allegations with the indictment in this case. The proof showed that in response to an induction order of his local board, the defendant appeared at the induction station, but declined to submit to induction unless he was given a guarantee against compulsory vaccination after he was in the Army. The circuit court of appeals had no doubt that the proof supported the in-

dietment. It said, "Obviously the duty to report for induction means more than putting in an appearance at the induction station. The selectee must not only appear but must be ready to go through the process which constitutes induction into the army." And compare *United States v. Longo*, 140 F. 2d 848 (C. C. A. 3), in which it was held that a registrant who was directed to report for a preinduction physical examination and who reported to the local board and informed the board that he refused to undergo the examination had not complied with the order to report. To the same effect, see *Edwards v. United States*, 145 F. 2d 678 (C. C. A. 9).

Admittedly, petitioner never intended to comply with the induction order of his local board. Even after he was brought to the induction station against his will, he persisted in his position that he would not be inducted, to the extent of declining to express a choice as between service in the Army or Navy. There is no question in the case that he did not submit to induction. In these circumstances, we think it clear that he knowingly failed to perform a duty required of him by the Selective Training and Service Act and the Selective Service Regulations, as charged in the indictment, and, therefore, that the court properly denied petitioner's motion for a directed verdict (R. 27-28).

B. Petitioner is in no stronger position even if it be assumed that an order to report for induc-

tion requires only that the registrant shall report to the local board at the time specified in the induction order. For it is undisputed that he did not report to his local board at 8:30 A. M. on September 30, 1943, as he was directed by the induction order. At the trial, petitioner took the position that this neglect of duty was caused by the compulsion exercised over him by the local police and that his failure to report was therefore excusable under the doctrine that coercion which induces a well-grounded apprehension of death or serious bodily injury will excuse the commission of a criminal act. See *Respublica v. McCarty*, 2 Dall. 86, 87; *Giugni v. United States*, 127 F. 2d 786, 791 (C. C. A. 1); *Shannon v. United States*, 76 F. 2d 490, 493 (C. C. A. 10). The trial court agreed that if an intervening force beyond petitioner's control prevented him from doing what was required of him, that would be a good defense, and it so instructed the jury (R. 31-32). We believe that the facts of this case are such that no jury could have found that the coercion practiced on petitioner bore any causative relation to his failure to report for induction.

Petitioner testified (R. 20, 47-48) that he knew he was required to report to his local board at 8:30 A. M., on September 30, 1943, and that on that day it was his intention not to report to his local board, and, instead, to present himself to the United States Commissioner. Accordingly, at a time between 8:00 and 9:00 A. M., the exact time

not being clear,* petitioner was in his home shaving when the three men hired by his father came to his home and told him to accompany them to Fort Jackson, the induction station. There is no evidence that petitioner informed these men that he was supposed to be at his local board or that he wanted to go to the board's office. Likewise, there is no evidence that petitioner had made any plans or arrangements for reporting to the local board. In these circumstances, especially in view of petitioner's unqualified testimony that he did not intend to report and in the absence of any facts showing a last-minute change of intention, there is no basis for concluding that petitioner was prevented from reporting for induction by the coercion practiced upon him by the three men.

* Petitioner testified on direct examination that at a time between 8:30 and 9:00 A. M. (R. 13) he was brought to Fort Jackson from his home which was six or seven miles away (Tr. 43). On cross-examination, he testified that he understood that he was required to report to his local board at 8:30 and that "they called at 9:00 o'clock" (R. 20). Thereafter, petitioner testified, "I am not definite on the exact time, but I knew it was around 8:15 or 8:30, between 8:00 and 8:30. I could not tell you the exact time" (R. 50-51). In response to an inquiry whether he had told an F. B. I. agent in an interview that it was after 8:30 that the men came to his home petitioner testified, "I don't remember whether it was or not." "I do not remember what I told him, but it was prior to the time to report for induction. How much, I don't know." (R. 21, 51.) Following the close examination of petitioner concerning the time when the men came to his home, his parents both testified that the men came to their home at 8:00 A. M. (R. 21, 24).

Since petitioner had no intention to report, the compulsion obviously did not prevent him from performing his duty. Its only effect was to prevent petitioner from presenting himself to the United States Commissioner, where he intended to go in lieu of reporting for induction. It is, we submit, a perversion of the defense of compulsion to urge, as petitioner does, that the compulsion prevented him from performing an act which he never intended to perform. For, as we view it, the very theory of the doctrine of compulsion is that no criminal liability ensues because the compulsion is the proximate cause of the criminal act. Where, as in this case, there is no showing that, but for the intervening compulsion, the criminal act would not have been committed, the defense of compulsion is without foundation.

We agree with petitioner that if he had reported for induction at the induction station, instead of first reporting to his local board for delivery to the induction station, there would have been substantial compliance with the induction order. But, of course, as petitioner urged in the habeas corpus case, he did not report to the induction station in compliance with the induction order,¹ and, as we have shown, when he was at the

¹ In the habeas corpus proceeding, petitioner argued in his brief in the district court that:

"It was amply proved that he [petitioner] was carried to the induction station under compulsion by three men, at least one of whom was armed. The father of the boy admitted

induction station it was against his will and not for the purpose of induction.

C. Petitioner is mistaken in his contention that the Government's theory in the trial court, and the theory on which the case was submitted to the jury, was that he had failed to report to the local board at 8:30 A. M., on September 30, 1943, and that the abduction was 'arranged by him.' There is no question but that he did not go of his own accord.

"He was ordered by the local board to report to the board to be sent to the induction station for induction. He did not report but was carried directly to the induction station by armed men at the instance of his father and delivered to the military authorities.

"That illegal action was jurisdictional and rendered all subsequent proceedings void. The law itself provides in Section 11 of the penalty *for failure to report*, the penalty being, not forcible delivery or induction, but trial in the district court. That is all that can be done. * * * [Italics added.]

In the circuit court of appeals, petitioner's brief urged that: "An 'inducted man' is a man who has become a member of the land or naval forces through the operation of the Selective Service System. (Selective Service Regulations, sec. 601.7) Louis D. Smith, Jr., did not become a member of the armed forces 'through the operation of the Selective Service System.' *The operation of the System ceased when it issued the order to report for induction and he declined to report.* * * * Section 11 of the Selective Training and Service Act limits the attachment of military law and jurisdiction over a registrant to those persons who voluntarily appear at the induction station. Section 11 has a legislative history which dispels any intention of conferring jurisdiction over any person who did not voluntarily respond to the order to report for induction. *It was the intention of Congress that one who refused to report should be prosecuted only in the United States District Court and that he would not be subject to military jurisdiction.*" [Italics added.]

that the subsequent events at the induction station were regarded as having no bearing on the question whether he reported for induction. It is true that the Government established a prima facie case by showing that petitioner was ordered to report to the board and that he failed to do so. (See R. 6-7, 45.) But in cross-examining the Government's witness and thereafter by his own testimony petitioner attempted to show, as compliance with the induction order, that he had reported to the induction station. (See R. 7, 11-21, 47-49; Tr. 15-16.) To meet this evidence the Government established by cross examination of petitioner that he never intended to report for induction, and that at the induction station he made known his refusal to be inducted, he refused to select between service in the army and navy, and he refused to submit to induction. (See R. 20, 47-52.) That both the prosecuting attorney and the trial judge recognized petitioner's attempted defense that he reported for induction at the induction station is plainly evident from one of the incidents at the trial (Tr. 38). In cross-examining petitioner, the Assistant United States Attorney asked him: "After you arrived at the fort did you at any time propose to submit yourself for induction into the United States army or did you do anything- —." Petitioner's counsel interrupted the question before it was completed with an objection "on the ground that this wit-

ness is not being charged with refusal to be inducted, but the charge is merely reporting, and it really has no bearing on the issue." In overruling the objection the trial judge stated: "It seems to me that the counsel for the witness or defendant has undertaken to develop a line of testimony upon which they expect to predicate a plea that he has already reported for induction, and, in fact, the counsel has already made that statement in open court, and I think he may be cross-examined along that line."

The colloquy between petitioner's counsel and the trial judge at the close of all the evidence (R. 25-28) likewise demonstrates that the trial judge considered the evidence in respect of the events at the induction station in determining whether there was enough evidence to go to the jury, but that it was his view that, if petitioner reported at all, it was for the purpose of not being inducted rather than for the purpose of induction (R. 27). In charging the jury the court, in effect, told the jury that the Order to Report for Induction defined petitioner's duty (R. 30-31)*; and that "In this case the defendant is charged with knowing that he was required by his local board having jurisdiction over him to report at a certain time for induction into the Army and that, with

* In the course of the trial the judge stated in response to a question posed by petitioner's counsel as to the purpose of the Order to Report that "As a matter of law it is for the purpose of inducting them into the service" (Tr. 21-22).

knowledge of that requirement and with no intention to perform it, he stayed away and did not do that which was required of him" (R. 31-32; see also R. 28, 30). In respect of petitioner's request to instruct the jury that he was charged with having failed to submit to induction, the court instructed the jury that "He is charged, Gentlemen of the Jury, not with failure to submit to induction in terms but with failing to report for induction. I make that qualification of that Request." (R. 35.) The court then instructed the jury to consider "all of the testimony in this case" (R. 38) and submitted the case to the jury.

The court properly, we think, refused petitioner's Requested Instruction No. 10 (R. 37), that if petitioner was present at the induction station and underwent the prescribed procedure short of submitting to induction he had, as a matter of law, reported for induction. In our view the instruction was defective because it excluded from the jury's consideration the circumstances under which petitioner reached the induction station against his will, and because it excluded from the jury's consideration the element of petitioner's having failed to submit to induction in determining whether petitioner had reported, and, if so, whether he did so for the purpose of induction, as was required by the local board's order.

II

SINCE PETITIONER WAS FINALLY CLASSIFIED BY THE DIRECTOR OF SELECTIVE SERVICE ON A DE NOVO CONSIDERATION OF HIS CASE, THE PROPRIETY OF THE CLASSIFICATION PREVIOUSLY GIVEN HIM BY HIS LOCAL BOARD WAS IMMATERIAL AT HIS TRIAL. THIS CASE IS IN THE SAME POSTURE AS *BOWLES v. UNITED STATES*, 319 U. S. 33.

The second branch of the case poses the question whether petitioner was entitled to challenge the correctness of this classification as a defense to the indictment. Even if it be assumed, as petitioner urges, that the defense is available in the criminal trial, we think it clear that the trial court did not err in this case. For petitioner attempted only to challenge the classification as given him by his local board, a challenge which was academic, because petitioner had been finally classified on an appeal to the President.

It appears from the decision in petitioner's habeas corpus case (53 F. Supp. 582) and from his selective service file, which the Court may judicially note (*Bowles v. United States*, 319 U. S. 33, 35), that petitioner was first classified I-A by his local board. He appealed from that classification to his board of appeal, which likewise classified him I-A, with one member of the board dissenting. Because of the dissent, petitioner was able further to appeal to the President (Reg. 628.2). On that appeal, he was classified I-A (*infra*, p. 92). This was the final classification

upon which the order to report for induction was predicated. Since it is settled that a classification on appeal to the President is a *de novo* classification which entirely replaces the classification of the board of appeal and the local board (*Bowles v. United States*, 319 U. S. 33; *Falbo v. United States*, 320 U. S. 549, 555 (concurring opinion)), petitioner could have made his defense, assuming it were open to him, only by showing that the decision on the appeal to the President was not according to law.

But he did not seek to do this. As in the habeas corpus action (see 53 F. Supp. 582, 585), petitioner sought to show at his criminal trial that his local board had improperly classified him. While the record in this respect is cryptic, it is fairly evident that petitioner was attempting to show, as he had in the habeas corpus action, that the local board was prejudiced against Jehovah's Witnesses, and that as a result he was denied classification as a minister (cf. R. 15-16), and it is plain that the trial judge understood that this was petitioner's objective (R. 10). When petitioner took the stand, his counsel immediately questioned him concerning his ministerial status. On the objection of the Government, the trial court inquired of petitioner's counsel whether it was his intention to attack "the rulings of the Draft Board" and counsel replied in the affirmative, at which point the court ruled that petitioner

could not do so in his criminal trial (R. 9). In the colloquy which followed (R. 10-11) the court again said that "you cannot offer testimony to attack the action of the Local Board" and petitioner's counsel responded, "we take this position, that this defendant has complied with all of the ministerial regulations completely under the Billings case and now that he has the right in this case to attack the rulings of the Board as the Supreme Court of the United States said that he did have the right to attack in the Falbo case."

We are mindful of the fact that the trial court probably rejected petitioner's proffered evidence on the theory that he was not, in any event, entitled to challenge his classification in his criminal trial. But irrespective of the reason for the court's rulings, we believe that the court did not err. For, as we have shown, even if the local board classification was improper for any reason, that impropriety was cured by the final classification on the appeal to the President. *Bowles v. United States*, *supra*; Mr. Justice Rutledge concurring in *Falbo v. United States*, *supra*. Petitioner tendered nothing to show that the latter classification was other than according to law.

III

HAVING REFUSED TO SUBMIT TO INDUCTION, PETITIONER WAS NOT ENTITLED TO CHALLENGE THE PROPRIETY OF HIS SELECTIVE SERVICE CLASSIFICATION IN HIS CRIMINAL TRIAL. HABEAS CORPUS AFTER INDUCTION IS THE EXCLUSIVE REMEDY TO TEST THE CONSTITUTIONALITY OF THE INDUCTION ORDER

The facts of this case stand apart from all other reported selective service cases. Their uniqueness stems from the fact that, contrary to petitioner's admitted desire to defy completely the order of his local board, he found himself in a position where, against his protests, he was forcibly brought to the induction station and his acceptability to the armed forces was determined in the same manner as was the acceptability of other registrants from his local board who had reported for induction. While the results of petitioner's physical examination do not appear in the record, it is evident from the fact that he was required to undergo the induction ceremony that he had been found acceptable by the Army, as is required by Section 3 (a) of the Act as a condition precedent to military service. In these circumstances, we shall, for this branch of the argument, treat the case as though petitioner had complied with the induction order, except that he refused to undergo the induction ceremony. Thus, the question presented, assuming that the record properly presents the issue (cf. Point II, *supra*), is whether a registrant may defy the Act and the Selective Service Regulations by refusing to submit to induction

and defend that defiance by challenging the correctness of his Selective Service classification in his criminal trial.

A. Although the question is peculiar to the present Selective Training and Service Act,^{*} it is

^{*} The question did not arise under the 1917 draft law, since criminal sanctions were not utilized in the last war for failure to report for induction. Rather, under the 1917 Act and regulations, a registrant was considered to be inducted and subject to military law immediately from the time designated for reporting. If he failed to report, he was subject to court martial for desertion. Articles of War, Sec. 2a, 41 Stat. 787, 10 U. S. C. 1473; Selective Service Regulations (1917) Secs. 133, 140; *Franke v. Murray*, 248 Fed. 865 (C. C. A. 8); cf. *United States v. Bullard*, 290 Fed. 704, 707 (C. C. A. 2), certiorari denied, 262 U. S. 760. Accordingly, the question of available defenses in a criminal proceeding for failing to report for induction was not presented.

But in a habeas corpus proceeding brought by a registrant who had not reported for induction and who was held for desertion, it was ruled that erroneous and, indeed, arbitrary classification did not justify a refusal to report. See *Ex parte Romano*, 251 Fed. 762, 764 (D. Mass.). Under the 1917 Act, the Judge Advocate General repeatedly ruled that a plainly mistaken classification did not void the induction and, accordingly, the registrant was required to apply to the military for discharge. JAG 334.4, June 7, 1918; JAG 327.3, October 30, 1918, November 9, 1918. And an erroneous classification was held no defense in a court martial for desertion arising out of failure to report for induction. See C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912-1930), in which it was stated—

“* * * While it is true there was no direct evidence that the accused was registered or classified, the order to entrain and proceed to camp is established beyond all doubt. The order imports rightfulness and verity as against any assault in these proceedings.” (C. M. 122330, Choroshen; C. M. 114991, Aniki.)

no longer a novel one.¹⁰ Substantially the same question was before the Court in *Bowles v. United States*, 319 U. S. 33, but that case was decided on other grounds. Shortly thereafter it was again before the Court in *Falbo v. United States*, 320 U. S. 549. We think that the rationale of the decision in that case dictates the answer to petitioner's contention in this case, namely, that petitioner was not entitled to defy with impunity the order of his local board by refusing to submit to induction; the necessity for speedily mobilizing the nation's manpower without litigious inter-

¹⁰The problem is not presented in Great Britain. Under the British National Service Act, 1939, 2 and 3 Geo. VI, c. 81, judicial review of administrative determinations is not possible since that statute provides, in respect of matters committed to the determination of the various agencies established for its administration, that the decisions of such agencies are final and shall not be called in question in any court of law (Secs. 5 (12), 6 (9), 10 (2)). It may be noted, however, that this statement does not apply to persons claiming to be ministers, for they are not required to register and are not classified administratively (Secs. 2 and 11 (1)). Under the 1916 Acts ministers were required to register (National Registration Act (1915) 5 and 6 Geo. V, c. 60, Sec. 1) but not to serve (Military Service Act (1916) 5 and 6 Geo. V, c. 104, Schedule 1) and were not classified administratively (see Sec. 2 (1)). For this reason, we think that such cases as *Offord v. Hiscock*, 86 L. J. K. B. 941, and *Hawkes v. Moxey*, 86 L. J. K. B. 1530, relied upon by the dissenting Justice in the *Falbo* case (320 U. S. at p. 560) and by petitioner, are not apposite. As the English courts recognized, those cases presented only the question whether the defendants were within the statutory exception granted ministers; no question of judicial review of administrative action was involved in the cases or discussed by the courts.

ruption requires that he should have completed the last step in the Selective Service procedure by submitting to induction. This would seem to be made plain by the requirement of Section 11 of the Act that duties required by the Act must, without exception, be performed.

As in petitioner's case, Falbo was indicted for knowingly failing to perform a duty required of him under the Act; Falbo wilfully failed to obey his local board's order to report for assignment to work of national importance. His proffered defense was that he had no "duty" to comply with his local board's order, because it was based on an arbitrary classification. Similarly, petitioner sought to defend this prosecution on the ground that he was improperly denied classification as a minister of religion. When the *Falbo* case was argued in this Court the Government showed that the order to report for induction is but an intermediate step in the Selective Service process, and it argued that the intent and scheme of the Selective Training and Service Act required that the order must be obeyed. The argument there made, and which is equally appropriate here, was that if armed forces are effectively to be raised and maintained by conscription, it is of paramount importance that one who is called up respond promptly. The necessities of the situation are such that the nation cannot permit a registrant to flout an order to report because he thinks that his classification is

wrong, thus depriving the Army of a soldier and putting the burden on the Government to seek him out and proceed against him. So, at all events, it must be taken that Congress concluded. In the *Falbo* case, the further argument was made that considerations of due process are given full effect if a remedy is made available after the registrant has submitted to induction. See Brief for the United States, No. 73, 1943 Term, pp. 27-61.

This Court so held. In its opinion the Court did not rely on any doctrine of self-imposed judicial abstinence from interposing judicial relief in the midst of the administrative proceeding; the opinion was predicated on the Court's interpretation of the Congressional intent underlying the Act. The Court recognized that when the Act was enacted "The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. * * * Accordingly the Act was passed to mobilize national manpower with the speed which that necessity and understanding required." (320 U. S. at 551-552.) The Court pointed out that the order to report for induction comes at an intermediate point in the selective process; it comes after the registrant has been classified but before his acceptability to the armed forces has been determined. It is "no more than a necessary intermediate step in a united and continuous

process designed to raise an army "speedily and efficiently" (320 U. S. at 553). In order to facilitate the speedy completion of the process, the Court stated, the registrant is obliged to obey the induction order. Laying at rest the same constitutional argument which petitioner here makes, the opinion concluded that "Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service" (320 U. S. at 554). In answering the question raised by the facts of that case, the Court held that Congress had not authorized judicial review of Falbo's classification in the criminal prosecution (*ibid.*):

* * * The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for *inducting* great numbers of men into the

armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. *But Congress apparently regarded "a prompt and unhesitating obedience to orders" issued in that process "indispensable to the complete attainment of the object" of national defense. Martin v. Mott, 12 Wheat. 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.*

Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made.
* * * [Italics added.]

To the same effect see, *e. g.*, *United States v. Kauten*, 133 F. 2d 703 (C. C. A. 2); *United States v. Grieme*, 128 F. 2d 811 (C. C. A. 3); *United States v. Sauler*, 139 F. 2d 173 (C. C. A. 7); *Bronemann v. United States*, 138 F. 2d 333 (C. C. A. 8); cf. *Giese v. United States*, 143 F. 2d 633 (App. D. C.), affirmed by an equally divided court, 323 U. S. 682.

In our view, the *Falbo* decision recognized that Congress had selected between two sharply conflicting interests. On the one hand; there was involved the personal interest of the registrant that

he should be treated according to law by the Selective Service System and that he should not be required to submit himself to military jurisdiction until he had been accorded such treatment. Competing with the interest of the individual was the vital interest of the nation that its manpower should be mobilized for military service with the speed necessary to protect the nation from destruction. The urgency was so great that the mobilization program could brook no delay, including that which would be occasioned by efforts to test the legality of selective service action while the selective service procedure in those cases was still in motion. Recognizing the emergency and that Congress had provided a system carefully designed to insure fair treatment to all registrants, the Court concluded, properly we think, that Congress intended that where an order to report for induction is issued by the board having jurisdiction over the registrant and where the order is valid on its face, it must, without exception, be obeyed. While the Court did not reach the question, we think that the decision implicitly recognized that this does not mean that the individual is without protection from illegal administrative action. Rather, the decision contemplates that after a registrant has submitted to induction and the selective service procedure has thus come to an end, he may have his day in court by resorting to the writ of habeas corpus to test the constitutionality of the administra-

tive action. See Mr. Justice Murphy, dissenting; 320 U. S. at p. 557, fn. 1, 559; Mr. Justice Douglas, concurring in *Hirabayashi v. United States*, 320 U. S. 81, 108-109. And see *infra*, pp. 50-56.¹¹

Petitioner's disagreement with our view of the controlling authority of the *Falbo* case rests upon two contentions, neither of which, we believe, supports his argument that a registrant may stop short of induction and defend his refusal to proceed further by challenging his selective service classification in his criminal trial.

¹¹ This view seems to have had at least tacit acceptance by Congress. In January of this year there was before the House Committee on Military Affairs a proposed amendment of the Selective Training and Service Act to include within it provisions regulating civilian manpower. The amendment provided *inter alia* that in a prosecution for failure to perform a duty under the provisions regulating civilian manpower certain defenses, including the defense that the defendant did not receive fair consideration, should be available. In explaining the reason for this provision the Committee Report (No. 36, 79th Cong., 1st sess., pp. 4-5) stated:

"Under the act as it is now written, registrants who are ordered to submit to induction into the armed forces may not refuse and defend such refusal in a criminal prosecution on the ground that their classifications were not given fair consideration by their boards. In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issue by habeas corpus. (See *Ex parte Stanziale* (1943), 3d Cir., 138 F. 2d 312, cert. den., 320 U. S. 797.) Since a habeas corpus proceeding is not available to registrants ordered to accept employment under Section 5 (a), they are in a status different from registrants ordered to submit to induction into the armed forces, and thus are permitted under the bill to raise these issues in the criminal proceeding."

In arguing that he may withdraw from the selective service procedure as soon as he has been found acceptable for military service, petitioner urges that the *Falbo* decision requires a selectee to obey his induction order only until his last remedy under the selective service procedure is exhausted. In his view, once it is finally determined that he will be required to perform military service, he may refuse to proceed further as a means of securing judicial review of his selective service classification. We think the difficulty with petitioner's position is that the *Falbo* decision involves more than an application of the settled rule of judicial self-limitation, that the courts will not test the legality of administrative action until the administrative remedies have been exhausted. The decision was predicated on the Court's interpretation of the Congressional intent that there should be no interruption of the mobilization process (see *supra*, pp. 35-37). As the Court pointed out, in order to facilitate the speedy completion of the process of raising an army, Congress required that the registrant obey the induction order, and it evinced its intention that there should be no litigious interruption of the administrative process by failing to provide for intermediate challenges of orders to report for induction. In support of his position, petitioner points to that language in the *Falbo* decision which reads (320 U. S. at 553-554):

The connected series of steps into the national service which begins with registration with the local board, does not end until the registrant is *accepted* by the army, navy, or civilian public service camp. * * *

* * * Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final *acceptance* of an individual for national service. [Italics added.]

Petitioner urges that this language means that the process ends when it is determined at the induction station that the registrant is acceptable for service and before he undergoes the induction ceremony. But we think it plain that the italicized words refer not to the determination of acceptability but to the registrant's final acceptance into national service, either in the armed forces or in a Civilian Public Service Camp. In its brief in the *Falbo* case (pp. 32, 37, 43, 55) the Government used "acceptance" in that sense and there is nothing in the *Falbo* decision which indicates that the Court used it in any other sense or that it meant "acceptance" to describe anything short of actually being a member of the armed forces or a Civilian Public Service Camp. We are persuasively supported in this view by the parallel which the Court drew between an order to report for induc-

tion and an order to report for work of national importance. Thus, the Court pointed out (320 U. S. at 553) that the selective service process does not end with the completion of the functions of the local boards and appellate agencies, for—

The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp. The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy or civilian public service camp.

Significantly, at the time of the *Falbo* case, a conscientious objector became a member of a civilian public service camp when he passed his physical examination at the camp and was accepted by the camp director.¹² There was no induction ceremony. (Reg. 653.11, *infra*, pp. 87-89.) Acceptance was the point at which the registrant became a member of the camp and was thus the last step in the process. There is no basis for concluding that the Court regarded selectees as being in a different procedural position than conscientious objectors. Accordingly, we think it plain that, while a selectee's acceptability was as-

¹² At the present time, a conscientious objector who reports to a civilian public service camp is accepted regardless of the outcome of his physical examination at the camp. (Reg. 653.11.)

certained prior to the induction ceremony, the Court regarded a selectee as not finally accepted for military service until he underwent the induction ceremony and the selective service procedure came to an end. Cf. *Billings v. Truesdell*, 321 U. S. 542, 547-548; see *infra*, pp. 47-50.

Petitioner also urged that the *Billings* decision demonstrates that this Court has not held that a registrant who refuses to submit to induction is foreclosed from challenging his selective service classification in his criminal trial. His argument rests upon the following language of the opinion (321 U. S. at 558):

Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report.

It will be remembered that the *Billings* case, which arose on an application for habeas corpus

challenging the military jurisdiction, did not involve the question of the *Falbo* case. Rather, the principal issue was whether a selectee who refused to submit to induction was subject to civilian or military jurisdiction. The language upon which petitioner relies is found in part III of the Court's opinion, which was addressed to the respondent's contention that Billings was inducted when the oath was read to him and he was told he was in the Army, at a time when he was under guard and was retained against his will. In rejecting this argument, the Court held that Billings had not yet been inducted and that he was therefore subject to punishment by the civilian authorities as a violator of the Selective Training and Service Act. For, the Court said, to accept the respondent's view would be to undermine the congressional policy of fixing the maximum punishment for those who disobey the order of their local board and refuse to be inducted. It is at this point in the opinion that the quoted language relied upon by petitioner appears. We think its import is that if the respondent's argument that a reading of the oath was enough to subject a selectee to military jurisdiction were accepted, then one who, like Billings, reported to the induction station but was unwilling to submit to induction would be placed in a less favorable position than a selectee who failed to report at all. For the former would be subject to the sanctions of the

Articles of War, whose penalties far exceed those described by the Selective Training and Service Act, while the latter would be prosecutable only under the Act.

In any event, we agree with the Circuit Court of Appeals for the Seventh Circuit (*United States v. Rinko*, 147 F. 2d 1, certiorari denied, April 30, 1945) in believing that the *Billings* decision was not intended to limit the doctrine of the *Falbo* case,¹³ for "it is unreasonable to suppose that the court intended thereby within less than 90 days following the *Falbo* decision to announce any different procedure than that approved in the *Falbo* decision—at least not by implication." And we are not alone in this view. The construction of the *Billings* decision urged by petitioner in this case has been argued in the same terms in numerous cases in the lower federal courts and it has been uniformly rejected. In some cases it has been rejected *sub silentio* and

¹³ Compare Mr. Justice Douglas concurring in *Hirabayashi v. United States*, 320 U. S. 81, 108-109:

"There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that after induction he may obtain through *habeas corpus* a hearing on the legality of his classification by the draft board. * * *. We need go no further here than to deny the individual the right to defy the law. It is sufficient to say that he cannot test in that way the validity of the orders as applied to him."

in others the courts, like the court below and the court in the *Rinko* case, have expressly stated views which coincide with the Government's position. See, e. g., *United States v. Flakowicz*, 146 F. 2d 874 (C. C. A. 2), certiorari denied, April 30, 1945; *Klopp v. United States*, 148 F. 2d 659 (C. C. A. 6); *Sirski v. United States*, 145 F. 2d 749 (C. C. A. 1); *United States v. Estep*, 150 F. 2d 768 (C. C. A. 3), pending on writ of certiorari, No. 292; cf. *Bagley v. United States*, 144 F. 2d 788, 790 (C. C. A. 9).

If we are correct in our analysis of the doctrine of the *Falbo* case, petitioner, of course, was not entitled to challenge his selective service classification in his criminal trial. For this case is of the same pattern as the *Falbo* case and is distinguishable from it only in the fact that Falbo completely defied the order of his local board by failing to report at all, while petitioner reached the point where he was found acceptable by the Army before he refused to submit to induction. Since the order to report for induction includes a command to submit to induction (*Billings v. Truesdell*, 321 U. S. 542, 557), it is clear that petitioner defied his induction order just as much as Falbo violated his. In both cases the defendant stopped short of actual induction; and we submit that, like Falbo, petitioner was thus precluded from attacking his classification in his criminal trial.

B. But even if it be assumed, as petitioner urges, that the *Falbo* decision limited itself to the specific facts of the case and that the question presented by this case is still open, every pertinent consideration supports our view that the rule of the *Falbo* case should be extended to the facts of this case. As we have pointed out, *supra*, pp. 35-38, we believe that the *Falbo* decision is predicated upon the proposition that Congress regarded " 'a prompt and unhesitating obedience to orders' issued in that [selective service] process 'indispensable to the complete attainment of the object' of national defense" (320 U. S. at p. 554) and that it therefore did not contemplate interferences with that process by challenges of orders to report. The same reasoning is applicable to the facts of this case. For the process was not yet at an end when petitioner defied his induction order; we believe that the selective service procedure does not end until the selectee is inducted into the armed forces or is accepted at a civilian public service camp. It requires no argument to establish that the object of the Selective Training and Service Act is to increase the personnel of the armed forces and to train them. It seeks to increase the size of the armed forces by a selective system of compulsory military service and, obviously, that objective is achieved only when a selectee becomes subject to military jurisdiction. Until that time he is subject to the procedures

established under the Act and any dereliction in duty is a violation of the Act. Until the selectee complies with the command of his local board that he submit to induction the administrative process is not at an end. *Biron v. Collins*, 145 F. 2d 758 (C. C. A. 5); cf. *Edwards v. United States*, 145 F. 2d 678, 680 (C. C. A. 9); *United States v. Flakowicz*, *supra*. As the Circuit Court of Appeals for the Third Circuit recently pointed out (*United States v. Estep*, *supra*, pp. 770-771):

In deciding when the administrative process is completed, it is relevant to keep in mind what all the activity is for. It is not ceremonial ritual, nor was it designed to provide committee activity for citizens of the various communities. It was, and is, designed to provide an Army and a Navy in a time of national emergency. The language of Congress, of the Supreme Court, and of those responsible for the administration of the selective service system, all make this clear.

* * * Until a man is actually inducted he remains a civilian and military need is unsatisfied. The *Billings* case, far from being of aid to defendant, only makes it clearer that civilian status remains unchanged until induction actually takes place. So far as achieving what Congress intended is concerned, it makes no difference whether a man refuses to register, or to fill out a questionnaire, to report to local

board or induction station, or refuses to be inducted. In any event, the end is not achieved while the man remains a civilian. Until he is inducted the administrative process has not been exhausted. Until it is, the registrant may not challenge validity of the local board's order in court.

This view finds support in the *Billings* decision. For, while the Court, in meeting the argument that *Billings* became a soldier when he was found acceptable, distinguished between the induction process and the procedure by which a selectee's acceptability to the armed forces is ascertained (321 U. S. at pp. 553-554), it pointed out in discussing the selective service process (at pp. 547-548) that:

* * * the mobilization program established by the Selective Service System is designed to operate "as one continuous process for the selection of men for national service"—a process in which the civil and military agencies perform integrated functions. *The examination of men at induction centers and their acceptance or rejection are parts of that process. Induction marks its end.* [Emphasis added.]

We perceive no sound reason in support of petitioner's contention that the determination of acceptability marks the end of the process. As we have shown, to draw the line at that point is to say that the process was at an end before the

objective of the Selective Training and Service Act has been achieved. Apart from the fact that the registrant then knows that he will be accepted for service, no greater reason appears for drawing the line at this point than at some earlier stage in the proceedings, such as when the induction order is issued. In so far as the Selective Service System is concerned, its function is frustrated in both situations.

Since we agree with the Court, that induction marks the end of the selective service process, we think it follows that in principle this case is indistinguishable from the *Falbo* case and that the doctrine of that case should be applied here.

C. We do not rest alone, however, on the technical legal considerations involved in determining when the mobilization process comes to an end. The same vital practical considerations which underlie the *Falbo* decision are present here. If the registrant may collaterally attack his selective service classification in the criminal trial the armed forces are deprived of the services of many of those registrants who believe themselves wrongly classified and the doors of the prisons are opened for them. At the risk that he may be mistaken and eventually be convicted as a felon, the registrant is encouraged to defy his induction order for the purpose of testing the propriety of his classification in the courts. Experience in enforcing the act has demonstrated time and again that registrants have refused to comply with orders to

report for induction because they mistakenly believed that that was the method for obtaining judicial review. And it suggests that if it generally had been believed that such review was available in a criminal trial, defiance of the induction order would have been resorted to by many registrants who, instead, complied with the induction order and thereafter resorted to habeas corpus.

That the criminal trial is not an adequate forum for reviewing the selective service action is best demonstrated by contrasting the consequences of petitioner's position with those of our view that the selectee must first obey the induction order and then seek judicial review in habeas corpus. A selectee who in compliance with the induction order submits to induction may, on the same day, initiate a habeas corpus proceeding for the purpose of testing the propriety of the selective service classification. Within a matter of days (see 28 U. S. C. 454-461) the writ will have issued, the respondent will have made a return showing by what authority he exercises jurisdiction over the petitioner, and an inquiry will have been had to determine the facts of the case. On the other hand, a selectee who seeks judicial review in the criminal trial must first knowingly defy the induction order. It then devolves upon the Government to seek out the defaulting selectee and institute criminal proceedings against him. This involves referring the case to the United States Attorney who in turn is obliged to refer the matter

to the Federal Bureau of Investigation with directions to apprehend the defaulting registrant. In those cases in which the selectee remains undiscovered by the F. B. I., and there are such cases,¹⁴ he completely avoids his responsibilities under the Act. In those cases where he is eventually apprehended the selectee has avoided performing his obligations under the Act during the entire period leading to his apprehension. The arrest is only the beginning. It still remains for the Government to present the matter to a grand jury and secure an indictment and then to bring the case to trial, both of which steps are time consuming, especially in rural districts. In contrast with the expeditious hearing in the habeas corpus court the criminal trial necessarily involves issues other than the legality of the administrative action and it often affords opportunity for further delay. Even more important than the time consuming delays occasioned by a criminal proceeding, if the defendant in the criminal trial fails to establish the illegality of his induction order¹⁵ he is lost to

¹⁴ The Department's records show that as of June 30, 1945, there were 18,450 selective service cases under investigation by the F. B. I. According to the records of the Selective Service System on May 31, 1945, there were 17,372 delinquents whose cases were pending and undisposed of. Of these, 5,523 had been pending for less than six months, 2,025 for from six months to one year, 4,231 for from one year to two years, 2,697 for from two years to three years, and 2,916 for over three years.

¹⁵ Experience during the course of the war demonstrates that the vast majority of registrants who believe that they were illegally classified are mistaken. For example, the De-

the armed forces. For instead of performing military services as was his duty under the Act he is convicted as a felon and is sent to prison. The habeas corpus proceeding, of course, involves no such disastrous consequences. If the registrant is successful in his challenge to the administrative order, he is immediately discharged from military custody and the task of proper classification may be resumed with little time having been lost. On the other hand if he fails to sustain his contention, he is remanded to his commanding officer and immediately is in a position to undertake the performance of his duty.

That habeas corpus is not an illusory remedy as petitioner seems to think is evident from its long history as a judicial process for inquiring into the lawfulness of the exercise of military jurisdiction over the individual. The courts have uniformly indicated in cases arising out of the Civil War Draft Act (see e. g., *Stingle's Case*, Fed. Cas. No. 13458 (E. D. Pa.)) and the 1917 act (*Arbitman v. Woodside*, 258 Fed. 441 (C. C. A. 4); *Ex parte Hutflis*, 245 Fed. 798 (W. D. N. Y.); *United States v. Rauch*, 253 Fed. 814 (S. D. N. Y.)), that habeas corpus is an appropriate remedy to test the validity of the actions of the draft boards. In the present war, habeas corpus

partment's records reveal that of 200 habeas corpus actions seeking to test the propriety of the selective service classification, which have proceeded to a final judgment during the period from October 16, 1940, to July 1, 1945, the petitioners were unsuccessful in 183 cases.

generally has been recognized as the exclusive remedy for inquiring into the legality of the draft board's action. See, e. g., *Biron v. Collins*, 145 F. 2d 758 (C. C. A. 5); *Fujii v. United States*, 148 F. 2d 298 (C. C. A. 10), certiorari denied *sub nom. Tamesa v. United States*, May 28, 1945; *United States v. Estep*, *supra*; ¹⁶ *Gibson v. United States*, 149 F. 2d 751 (C. C. A. 8), pending upon petition for a writ of certiorari; Connor and Clarke, *Judicial Investigation of Selective Service Action*, 19 Tulane L. Rev. 344. And many registrants who have sought judicial review have resorted to the writ of habeas corpus for a full judicial inquiry into the legality of their classifications (see e. g., *Cramer v. France*, 148 F. 2d 801 (C. C. A. 9); *United States ex rel. Phillips v. Downer*, 135 F. 2d 521 (C. C. A. 2); *United States ex rel. Trainin v. Cain*, 144 F. 2d 944 (C. C. A. 2), certiorari denied, 323 U. S. 795; *Ex parte Stanziale*, 138 F. 2d 312 (C. C. A. 3), cer-

¹⁶ We are unable to agree with the dissenting opinion of Judge Biggs that a registrant who submits to induction has voluntarily submitted to military jurisdiction and, therefore, may not resort to habeas corpus to test the legality of his local board's action. As this Court pointed out in the *Billings* decision (321 U. S. at p. 556) a selectee is not a volunteer; he acts under compulsion of the Selective Training and Service Act. As long as he acts seasonably to inquire into the legality of the selective service action (cf. *Hebbes v. Catovolo*, 145 F. 2d 866 (C. C. A. 5) and *Mayborn v. Hefebower*, 145 F. 2d 864 (C. C. A. 5), certiorari denied in both cases, April 30, 1945, we agree with the unanimous opinion of the courts that habeas corpus is an appropriate remedy to test the legality of the selective service action.

tiorari denied *sub nom. Stanziale v. Paullin*, 320 U. S. 797; *Harris v. Ross*, 146 F. 2d 355 (C. C. A. 5); *Benesch v. Underwood*, 132 F. 2d 430 (C. C. A. 6)), as well as into other questions affecting the legality of the local board's order. See, e. g., *United States ex rel. Beye v. Downer*, 143 F. 2d 125 (C. C. A. 2); *United States ex rel. La Charity v. Commanding Officer United States Army Induction Center*, 142 F. 2d 381 (C. C. A. 2); *United States ex rel. Reel v. Badt*, 141 F. 2d 845 (C. C. A. 2); *United States ex rel. Lynn v. Downer*, 140 F. 2d 397 (C. C. A. 2), certiorari denied, 322 U. S. 756; *United States ex rel. Brandon v. Downer*, 139 F. 2d 761 (C. C. A. 2); *Ex parte Green*, 123 F. 2d 862 (C. C. A. 2), certiorari denied, 316 U. S. 668; *United States ex rel. Zucker v. Osborne*, 147 F. 2d 135 (C. C. A. 2), certiorari denied, June 18, 1945; *United States ex rel. Bayly v. Reckord*, 51 F. Supp. 507 (D. Md.), *United States ex rel. Cascone v. Smith*, 48 F. Supp. 842 (D. Mass.).

Apart from experience in other cases, petitioner's experience in this case strikingly demonstrates that habeas corpus is not an illusory remedy and that it is free from the disadvantages arising from judicial review in a criminal trial. As we have shown in the Statement, *supra*, pp. 7-8, when the Army undertook to exercise jurisdiction over him petitioner instituted a habeas corpus action to test the propriety of his selective service classi-

fication and the legality of his induction. He had a prompt hearing before the habeas corpus court, the same court in which he was later prosecuted criminally, and he was accorded full opportunity to establish his contentions. Within three months after petitioner was placed on active duty in the Army, the habeas corpus court had entered findings (53 F. Supp. 582) and within a total of six months the mandate of the circuit court of appeals was executed (see *infra*, pp. 93-94). The consequence of petitioner's position that he should be free to test the propriety of his classification in his criminal trial is clearly shown by contrasting this case with the habeas corpus case. Today, more than two years after petitioner was required to submit to induction, he is still litigating the question of his "duty" to comply with the order of his local board.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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OCTOBER 1945.

APPENDIX A

STATUTORY PROVISIONS INVOLVED

The Selective Training and Service Act of 1940 as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; August 18, 1941, c. 362, 55 Stat. 626; December 20, 1941, c. 602, 55 Stat. 844; November 13, 1942, c. 638, 56 Stat. 1018, 50 U. S. C. Appendix 301-318) provided, in part, as follows:

SEC. 1. (a) The Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

(b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.

* * * * *

SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States * * * who is between the ages of eighteen and forty-five at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States: * * * The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land and naval forces of the United States for training and service, in the manner provided in this Act, such number of men as in his judgment

is required for such forces in the national interest: * * *

SEC. 5. * * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * * *

SEC. 10 (a). The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United

States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.

* * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise

evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

APPENDIX B

SELECTIVE SERVICE REGULATIONS

605.51 *Forms made part of regulations.*—All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether heretofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement.

* * * * *

621.1 *Mailing questionnaires.*—(a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return.

* * * * *

621.4 *Claims for, or information relating to, deferment.*—(a) The registrant shall be entitled to present all written information which he believes to be necessary to assist the local board in determining his proper classification. Such information should be included in or attached to the Selective Service Questionnaire (Form 40) and may include any documents, affidavits, or depositions. The affidavits and depositions shall be as concise and brief as possible.

* * * * *

622.11 *Class I-A: Available for military service.*—In Class I-A shall be placed every registrant who, upon classification, has not been placed in Class I-C, Class IV-E, Class I-A-O, or in a deferred class.

* * * * *

622.44 *Class IV-D: Minister of religion or divinity student.*—(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

Ⓢ(b) A “regular minister of religion” is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A “duly ordained minister of religion” is a

man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

* * * *

623.1 General principles of classification.—(a) Each registrant shall be classified as soon as practicable after his Selective Service Questionnaire (Form 40) is received by the local board. * * *

(b) It is the local board's responsibility to decide in the first instance the class in which each registrant shall be placed.

(c) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.

623.2 Information considered for classification.—The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (General) (Form 42), or Affidavit—Occupational Classification (Industrial) (Form 42A), and such other written information as may be contained in his file * * *

Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such infor-

mation is reduced to writing and placed in the registrant's file.

623.21 *Consideration of classes not requiring physical examination.*—(a) Upon undertaking to classify any registrant, it should first be determined whether he should be classified in Class I-C. If the registrant is not classified in Class I-C, it should next be determined whether he should be classified in Class IV-A.

(b) If the registrant is not classified in Class I-C or Class IV-A under paragraph (a) of this section, the local board shall next determine whether he should be classified in Class IV-C on the ground that he is a neutral alien who has filed DSS Form 301 or on the ground that there is no possibility of his being accepted for training and service because of his nationality or ancestry. Otherwise no consideration will be given to Class IV-C at this time.

(c) If the registrant is not classified in Class I-C or Class IV-A under paragraph (a) of this section and is not classified in Class IV-C under paragraph (b) of this section, consideration shall next be given to the following classes in the order listed, and the registrant shall be classified in the first class for which grounds are established:

Class IV-D

Class IV-B

Class III-C

Class III-A

Class II-C

Class II-B

Class II-A

(d) If the registrant is not classified in one of the classes set forth in paragraph (a), (b), or (c) of this section, and, under the provisions of section 622.61, he is completely disqualified morally and there is no possibility that a waiver of such moral disqualification can be secured, he shall be classified in Class IV-F (moral). Otherwise no consideration will be given to Class IV-F at this time.

(e) If the registrant is not classified in one of the classes set forth in paragraphs (a), (b), (c), or (d) of this section, consideration shall next be given to whether he qualifies for classification in Class III-D.

* * * * *

623.31 *Notice to registrant to appear for physical examination.*—(a) If a registrant has not been placed in one of the classes set forth in section 623.21 the local board, as soon as practicable after the determination of that fact, shall mail to him a Notice to Registrant to Appear for Physical Examination (Form 201). This notice shall fix the date, time, and place for the registrant to report for such physical examination, normally 5 days after the date of mailing of such notice.

(b) On the day and at the time and place fixed in the Notice to Registrant to Appear for Physical Examination (Form 201), the registrant shall appear before the examining physician and submit to physical examination.

* * * * *

623.33 *Physical examination by examining physician.*—(a) The Director of Selective Serv-

ice, from time to time, will issue a List of Defects (Form 220), which will set forth defects which manifestly disqualify the registrant for military service.

(b) A registrant shall personally appear before the examining physician and shall be examined in the manner provided in paragraph (c) of this section except when the examining physician or the local board is convinced that the appearance of the registrant for physical examination before the examining physician will be injurious to the registrant's health or the health of those who might be brought in contact with him. When the registrant appears before the examining physician, his physical examination should be held in a well-lighted, well-heated place. It should be held while the registrant is in the nude.

(c) The physical examination should consist of observing the registrant while walking toward, standing before, and walking away from the examining physician. The registrant may be required to go through calisthenics to determine the mobility of joints or to furnish a basis for determination of his alertness, intelligence, understanding of commands, postural tensions, tendencies to incoordination, and tremors. If peculiarities are noted, simple questions should be asked in an effort to bring out replies bearing on the mental health and personality characteristics of the registrant. The examining dentist, or if he is not available, the examining physician, will examine the mouth of the registrant. The examining physician will take blood from the registrant for a serological test. The blood spec-

imen will be collected in a container furnished by the State health officer and will be forwarded to the State laboratory or other laboratory designated by the State Director of Selective Service, together with the accomplished form prescribed within the State for such purpose. If the report on the first serological test of the registrant is other than truly negative, the examining physician shall take additional blood for further serological tests until he is satisfied that the blood is truly negative, truly doubtful, or truly positive. Additional blood for further serological tests will not be taken if distance or circumstances over which the local board or the registrant has no control make it impracticable for additional tests to be taken. Serological tests will be accomplished without expense to the Selective Service System, unless such expense is specifically authorized by the Director of Selective Service. No other laboratory procedures will be undertaken as a part of this physical examination.

(g) The examining physician shall enter in Item 24 on the Report of Physical Examination and Induction (Form 221) the result of the serological tests as "Truly Negative," "Truly Doubtful," or "Truly Positive."

(h) The examining physician will enter in Item 25 on the Report of Physical Examination and Induction (Form 221) any pertinent remarks which he deems advisable for the benefit of the examiners at the induction station.

(i) The examining physician, in Item 26 on the Report of Physical Examination and Induction

(Form 221), shall complete the answer to the following question:

Do you find that the above-named registrant has any of the defects set forth in the List of Defects (Form 220)?

If the examining physician's answer is "Yes," he shall describe the defects in order of their significance. If the examining physician entertains a doubt as to whether he should answer "Yes" or "No," his answer shall be "No." No other information should be included under Item 26.

* * * * *

623.51 *Procedure for classification after physical examination.*—(a) After physical examination, the report of the examining physician shall be considered, and the registrant shall be classified in the manner hereinafter provided.

(b) If the registrant is found to have a defect set forth in the List of Defects (Form 220) as manifestly disqualifying him for military service, he shall be classified in Class IV-F.

(c) If the registrant has made a claim that he is a conscientious objector and if such registrant has not been classified in Class IV-F as provided in (b) above, it shall be determined whether such registrant, by reason of religious training and belief, is conscientiously opposed to participation in war in any form, and, if he is, whether he is conscientiously opposed to both combatant and noncombatant military service or is opposed to combatant military service only. When this determination has been made, classification will continue in the manner hereinafter provided.

(d) Deleted.

(e) If the registrant has not been classified in Class IV-F in the manner provided in paragraph (b) of this section, he shall be classified in Class I-A; provided that: (1) If such registrant has been found to be a conscientious objector to combatant military service but not a conscientious objector to noncombatant military service, he shall be classified in Class I-A-O; or (2) if such registrant has been found to be a conscientious objector to both combatant and noncombatant military service, he shall be classified in Class IV-E.

* * * * *

623.61 *Classification and change of Classification.*—(a) As soon as practicable after the local board has classified or changed the classification of a registrant, it shall mail a notice thereof on a Notice of Classification (Form 57) to the registrant. (The date on which the deferment of the registrant terminates will be shown if he is classified in Class II-A or Class II-B.) At the same time, it shall mail a Classification Advice (Form 59) to the following:

(1) Every person whose signed Affidavit—Occupational Classification (General) (Form 42) or Affidavit—Occupational Classification (Industrial) (Form 42A) is on file in the registrant's Cover Sheet (Form 53);

(2) Every person whose signed Affidavit of Dependent Over 18 Years of Age (Form 40A) is on file in the registrant's Cover Sheet (Form 53); and

(3) Any other person authorized to request the reopening of the registrant's classification under the provisions of section 626.2 and whose

request that the registrant's classification be reopened is on file in the registrant's Cover Sheet (Form 53).

(b) After each local board meeting, a copy of the Local Board Action Report (Form 110), listing the registrants who have been classified or whose classification has been changed, shall be posted and kept permanently posted in a conspicuous place in the office of the local board. A copy shall also be sent to the government appeal agent. When a person is unable to ascertain the current classification of a registrant from the posted copy of the Local Board Action Report (Form 110), an employee of the local board, upon request, shall consult the Classification Record (Form 100) and furnish to the person making inquiry the current classification of such registrant.

(c) When the local board classifies or changes the classification of a registrant, it shall record such classification on the Selective Service Questionnaire (Form 40) and the Classification Record (Form 100). Such classification shall also be entered in Section II on the Report of Physical Examination and Induction (Form 221) when the registrant is classified following physical examination by the examining physician or when such physical examination has been waived. If the registrant has been denied a claim for a classification in Class I-A-O or Class IV-E, the local board shall enter on each copy of the Report of Physical Examination and Induction (Form 221) opposite Item 27 (a), a statement to that effect.

(d) When the Notice of Classification (Form 57) or Classification Advice (Form 59) is mailed, the date of mailing such notice shall be entered on the Classification Record (Form 100), and, in addition, the date of mailing such notice or advice and the persons to whom they are mailed shall be entered on the Selective Service Questionnaire (Form 40).

* * * * *

625.1 *Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board.

* * * * *

625.2 *Appearance before local board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classi-

fication Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified, provided that if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physi-

cal or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

625.3 *Induction stayed.* A registrant shall not be inducted during the period afforded him to appear in person before a member or members of his local board, and if the registrant requests a personal appearance, he shall not be inducted until 10 days after the Notice of Classification (Form 57) is mailed to him by the local board, as provided in paragraph (d) of section 625.2.

* * * * *

626.1 *Classification not permanent.*—(a) No classification is permanent.

(b) Each 'classified' registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification.

(c) The local board shall keep informed of the status of classified registrants. Registrants may

be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

626.2 *When registrant's classification may be reopened and considered anew.*—(a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the writ-

ten request of the State Director of Selective Service or the Director of Selective Service.

627.1 Who may appeal any determination of a local board to a board of appeal at any time.—

(a) Either the State Director of Selective Service or the Director of Selective Service may appeal from any determination of a local board.

(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.

627.2 Who may appeal registrant's classification to board of appeal under certain circumstances.—(a) The registrant, any person who claims to be a dependent of a registrant, any person who has filed written evidence of the occupational necessity of a registrant, or the government appeal agent may appeal to a board of appeal from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition by the examining physician, the examining station of the armed forces, or the local board.

(b) The government appeal agent may take any appeal authorized under paragraph (a) of this section at any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57) or at any time before the registrant is mailed an Order to Report for Induction (Form 150).

(c) The registrant, any person who claims to be a dependent of the registrant, or any person who has filed written evidence of the occupational

necessity of the registrant may take an appeal authorized under paragraph (a) above at any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57). At any time prior to the date that the local board mails to the registrant an Order to Report for Induction (Form 150), the local board may permit any such person to appeal, even though such 10-day period has elapsed, if it is satisfied that the failure of such person to appeal within the 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board thereafter permits an appeal, the right of such persons to appeal shall expire at the end of the 10-day period. If such an extension of time to appeal is granted by the local board, a record thereof shall be entered on the Selective Service Questionnaire (Form 40) under the heading "Minutes of Other Actions."

* * * * *

627.11 *How appeal to board of appeal is taken.*—(a) Any person entitled to do so may appeal in either of the following ways:

(1) By filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal.

(2) By signing the "Appeal to Board of Appeal" on the Selective Service Questionnaire (Form 40).

627.12 *Statement of person appealing.*—The person appealing may attach to his notice of ap-

peal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

627.13 *Local board to transmit record to the board of appeal.*—(a) Immediately upon an appeal being taken to the board of appeal, the local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision.

(b) Immediately upon determining that all steps required by the regulations have been taken and that the record is complete, the local board shall transmit the file to the board of appeal, provided that the State Director of Selective Service may direct the channels through which such file shall be forwarded to the board of appeal.

* * * * *

627.23 *Preliminary review.*—The board of appeal will carefully check each file to determine

whether all steps required by the regulations have been taken, whether the record is complete, and whether the information in the file is sufficient to enable it to determine the registrant's classification. If any steps have been omitted by the local board, if the record is incomplete, or if the information is not sufficient to enable the board of appeal to determine the classification of the registrant, the board of appeal shall return the file to the local board with proper instructions. If the board of appeal returns the file to the local board, it shall enter the date of the return in column 4 of the Docket Book of Board of Appeal (Form 102).

627.24 *Review by board of appeal.*—(a) The board of appeal shall consider appeals in the order in which they are received.

(b) In reviewing the appeal, no information shall be considered which is not contained in the record received from the local board and the decision of the board of appeal shall be based solely thereon.

* * * * *

627.26 *Decision of board of appeal.*—(a) The board of appeal shall classify the registrant, giving consideration to each class in the order in which the local board gives consideration thereto when it classifies a registrant. (See part 623.)

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, however, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 626.

627.27 *Record of decision on appeal.*—When the board of appeal makes its classification; it shall record its decision, showing the yes and no vote, upon the Selective Service Questionnaire (Form 40) and in the Docket Book of Board of Appeal (Form 102), shall mark the case "Closed" in the "Remarks" column of the Docket Book of Board of Appeal (Form 102), and shall immediately return the record to the local board, provided that the State Director of Selective Service may direct the channels through which the record shall be returned to the local board.

* * * * *

627.31 *Procedure of local board when appeal to the board of appeal is returned.* When the file of a registrant is received by the local board, it shall:

(1) Mail a Notice of Classification (Form 57) to the registrant and a Classification Advice (Form 59) to the government appeal agent; to every person whose signed Affidavit—Occupational Classification (General) (Form 42), Affidavit—Occupational Classification (Industrial) (Form 42A), or Affidavit of Dependent Over 18 Years of Age (Form 40A) is on file in the registrant's Cover Sheet (Form 53); and to the person who made the appeal, if other than any of the foregoing.

(2) If one or more members of the board of appeal dissented from the determination of that board, indicate on such notice the numerical division of the board of appeal.

(3) Enter on the Classification Record (Form 100) the date of mailing such notice and advice.

- (4) If the local board classification of the registrant has been changed by the board of appeal, enter the new classification in the Classification Record (Form 100) and, with red ink, draw a line through the local board classification.

627.41 *Appeal stays induction.*—A registrant shall not be inducted either during the period afforded him to take an appeal to the board of appeal or during the time such an appeal is pending.

627.61 *Reconsideration of board of appeal determination.*—(a) When either the Director of Selective Service or the State Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may, at any time, request a board of appeal to reconsider any determination made by it, stating his reasons for requesting such reconsideration. Upon receiving such a request, a board of appeal will reconsider its determination in any case.

(b) At any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (Form 57), as provided in section 627.31, or at any time before the registrant is mailed an Order to Report for Induction (Form 150), the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the board of appeal to reconsider its determination or appeal to the President. The reg-

istrant's file shall then be forwarded to the State Director of Selective Service. As soon as the State Director of Selective Service has acted upon the government appeal agent's request, he shall advise the local board and, if he determines neither to request the board of appeal to reconsider its determination nor to appeal to the President, he shall return the file to the local board.

* * * * *

628.1 *Who may appeal to the President from any determination of a board of appeal.*—(a)

When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of a board of appeal. He may take such an appeal at any time.

(b) An appeal to the President may be taken by the Director of Selective Service (1) by mailing to the local board, through the State Director of Selective Service, a written notice of appeal or (2) by placing in the registrant's file a written notice of appeal and, through the State Director of Selective Service, advising the local board thereof.

(c) An appeal to the President may be taken by the State Director of Selective Service (1) by mailing to the local board a written notice of appeal and directing the local board to forward the registrant's file to him for transmittal to the Director of Selective Service or (2) by placing in the registrant's file a written notice of appeal and advising the local board thereof. Before he forwards the registrant's file to the Director of

Selective Service, the State Director of Selective Service shall place in such file a written statement of his reasons for taking such appeal.

* * * *

628.2 Appeal to the President.—The registrant or any person who claims to be a dependent of the registrant or any person who has filed written information as to the occupational status of the registrant, at any time within 10 days after the mailing by the local board of the Notice of Classification (Form 57), notifying the registrant that the local board classification has been affirmed or changed, may appeal to the President provided the registrant was classified by the board of appeal in either Class I-A, Class I-A-O, or Class IV-E and one or more members of the board of appeal dissented from such classification. The local board may permit any person who is entitled to appeal to the President under this section to do so, even though the 10-day period herein provided for such an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such 10-day period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board permits such an appeal, the right of such persons to appeal to the President shall terminate at the end of the 10-day period herein provided.

* * * *

628.4 Procedure on appeal to the President.—
 (a) When an appeal to the President is taken, the local board shall (1) notify the registrant that such an appeal has been taken, unless he is the

person who took the appeal; (2) if the registrant's file is in its possession, forward the entire file to the State Director of Selective Service; and (3) enter on the Classification Record (Form 100) the date the file is forwarded or the date it receives notice that an appeal has been taken. The local board shall not place in the file any statement or expression of opinion concerning the information in the registrant's file or the reasons for its decision.

628.6 *Procedure of local board when appeal to the President is returned.* When the file of the registrant is received by the local board, it shall:

(1) Mail a Notice of Classification (Form 57) to the registrant and a Classification Advice (Form 59) to the person making the appeal, if other than the registrant;

(2) Enter in the Classification Record (Form 100) the date of the mailing of such notice and advice; and

(3) If the classification of the registrant by the board of appeal has been changed, enter the new classification in the Classification Record (Form 100) and, with red ink, draw a line through the board of appeal classification.

628.7 *Appeal to the President stays induction.*—(a) When a registrant is classified by the board of appeal and one or more members of the board of appeal dissent from such classification, the registrant shall not be inducted during the period afforded him to take an appeal to the President.

(b) A registrant shall not be inducted during the time an appeal to the President is pending.

633.1 *Order to report for induction (Form 150).*—(a) Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (Form 150), in duplicate. The local board shall mail the original to the registrant and shall file the copy in his Cover Sheet (Form 53).

633.9 *Induction.*—At the induction station, the selected men found acceptable will be inducted into the land or naval forces.

633.13 *Classification when man is inducted.*—Upon receiving notice from the induction station that a selected man has been inducted, he shall be placed in Class I-C.

633.13-2 *Classification of man not accepted.*—(a) Upon receiving notice from the induction station that a selected man has not been accepted because he is disqualified for service in the land or naval forces, the local board shall reopen his classification and classify him in Class IV-F unless he is a man who was honorably discharged from the land or naval forces based on physical or mental disability, in which case the local board shall classify him in Class I-C.

633.21 Duty of registrant to report for and submit to induction.—(a) When the local board mails to a registrant an Order to Report for Induction (Form 150), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuous duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.

(b) Upon reporting for induction, it shall be the duty of the registrant: (1) to follow the instructions of a member or clerk of a local board as to the manner in which he shall be transported to the location where his induction will be accomplished, (2) to obey the instructions of the leader or assistant leaders appointed for the group being forwarded for induction, (3) to appear at the place where his induction will be accomplished, (4) to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished, (5) to submit to induction, and (6) if he is not accepted by the armed forces, to follow the instructions of the representatives of the armed forces as to the manner in which he will be transported on his re-

turn trip to the local board. (As enacted by Amendment No. 207, 9 F. R. 445, effective January 10, 1944.)

633.22 Forwarding registrants for induction.

When the registrants who are to be forwarded for induction have assembled, the local board shall proceed as follows:

(1) The roll shall be called, using the previously prepared Delivery List (Form 151) and noting any absences thereon in column 3 under Remarks. If any registrant fails to report for delivery, fails to report at the place of induction, is transferred to another local board for delivery, or is rejected, the local board shall not furnish a replacement for such registrant.

(2) A leader and assistant leaders shall be appointed and furnished with proper credentials. Leaders and assistant leaders shall have such authority as is necessary to deliver the group to the place of induction.

(3) The leader shall be given the following:

(A) The original and all copies of the Delivery List (Form 151),

(B) For each registrant being forwarded, the original and both copies of the Report of Physical Examination and Induction (Form 221); the copy of the Certificate of Fitness (Form 218); and other records referred to in subparagraph (2) of paragraph (a) of section 633.3.

(C) When it is necessary, transportation and meal and lodging requests for the group, covering their trip to the place of induction.

The leader shall be instructed to deliver the original and all copies of the Delivery List (Form 151), the originals and all copies of all Reports of Physical Examination and Induction (Form 221), all copies of Certificates of Fitness (Form 218), and all other information concerning the registrants in the group to the Commanding Officer of the Army Reception Center, the Navy Recruiting Station, or the induction station, as the case may be, or to his representative.

(4) The local board shall instruct all registrants in the group that it is their duty to obey the instructions of the leader or assistant leaders during the time they are going to the place of induction; that they will be met by proper representatives of the armed forces at the place of induction; that while they are at the place of induction, they will be subject to and must obey the orders of the representatives of the armed forces; that they must present themselves for and submit to induction; that if they are rejected, the representatives of the armed forces will, to the extent prescribed by the regulations of the armed forces, provide transportation and subsistence for their return trip. (As enacted by Amendment No. 207, effective January 10, 1944.)

653.11 *Reception at camps.*—(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will

be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service.

(c) If the assignee indicates that his physical condition has changed since his final-type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the camp director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service, will be retained in the camp or hospitalized where necessary.

(d) The camp director shall complete Item 79 of the Report of Physical Examination and Induction (Form 221), changing such parts thereof as may be required. The camp director shall retain the Armed Forces' Original of the Report of Physical Examination and Induction (Form 221) and shall forward the Surgeon General's Copy and the National Headquarters' Copy thereof to the Director of Selective Service.

(e) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(f) Upon receiving notice that a registrant has been rejected for work of national importance, the local board shall reopen his classification and classify him in Class IV-F.

* * * * *

Army Regulation 615-500, issued September 1, 1942, as amended, provided, in part:

SECTION II

13. Procedure. * * *

e. Induction ceremony.

(1) The induction will be performed by an officer who, prior to administering the oath, will give the men about to be inducted a short patriotic talk. The ceremony should take place in a setting, preferably a large room, made colorful by the display of flags with guard and display of suitable pictures, and made as impressive as possible. Wherever practicable, martial music will be provided either by a band or in the form of recorded music. For the benefit of any nondeclarant aliens about to be inducted the induction officer will explain the difference between the oath of allegiance and the oath of service and obedience. The oath, Article of War 109, will then be administered:

I, -----, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America;

that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War.

* * * * *

(4) They will then be informed that they are now members of the Army of the United States and given an explanation of their obligation and privileges. In the event of refusal to take the oath (or affirmation) of allegiance by a declarant alien or citizen he will not be required to receive it, but will be informed that this action does not alter in any respect his obligation to the United States. In the event a nondeclarant alien refuses to take the oath of allegiance or the oath of service and obedience the following statement will be typed under "remarks—administrative" of the service record:

Read the oath of service and obedience for aliens, upon refusal to swear thereto, and was informed that his refusal to so swear to the oath did not in any way alter his obligation as to service and obedience to the United States.

f. *Selectees disqualified.*—Selectees found disqualified will be instructed to remain for completion of section IV, DSS Form No. 221, and thereupon release to their representative group leader or the selective service representative at the Army physical examination station. No man will be rejected by the Army physical examination board until due consideration has been given to all information contained on DSS Form No. 221.

g. *Disposition of men rejected.*—Men rejected will be informed of the reason for their rejection, and provided with transportation to the location of the local board by whom they were forwarded for examination and induction, together with meal tickets when necessary, except that residents of the Territory of Alaska rejected at induction stations in the Territory of Alaska will be provided with such transportation and subsistence as is necessary to permit return to their homes or to the location of their boards.

* * * * *

16. *Disposition of men accepted.*—a. Inducted men who so desire will be given the opportunity, immediately after induction, to return to their residence to arrange personal, financial, and business affairs. This will be accomplished by release from active service, transfer to the Enlisted Reserve Corps, and subsequent call to active service. Should an inducted man not desire to return to his residence for this purpose, he will be forwarded direct to a reception center.

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APPENDIX C

The decision of the Director of Selective Service acting for the President, on petitioner's appeal to the President from the classification given him by his Board of Appeal is as follows:

Appeal No. 27589

APPEAL TO THE PRESIDENT OF THE UNITED STATES

Under the Provisions of the Selective Service Regulations

State of South Carolina

Board of Appeal No. 1

Local Board No. 68, Richland County

Registrant: Louis Dabney Smith

Order No. 14022

**Classification on Appeal to the President:
Class I-A**

This, the 23d day of July 1943.

By Authority of the President.

LEWIS B. HERSHEY,
Director.

APPENDIX D

The judgment of the court in *Smith v. Richart*, 53 F. Supp. 582, ordering petitioner released from military custody is as follows:

In the United States District Court for the
Eastern District of South Carolina, Co-
lumbia Division

Order C. A. 1100

LILA SMITH, PETITIONER

v.

D. G. RICHART, AS COLONEL UNITED STATES
ARMY AND COMMANDING OFFICER OF FORT
JACKSON, RESPONDENT

This case comes on for further proceedings in accordance with the mandate of the United States Circuit Court of Appeals for the Fourth Circuit, reversing the judgment of this Court by agreement of the parties, because the case comes within the rule announced by the United States Supreme Court in its decision filed March 27, 1944, reversing the judgment of the Tenth Circuit Court of Appeals in the case of *Arthur Goodwyn Billings v. Karl Truesdell, etc.*, filed after the judgment of this Court had been rendered on February 1, 1944. Now, therefore, in accordance with the foregoing,

It is ordered and adjudged as follows:

1. That the petition for writ of habeas corpus filed by the petitioner to obtain the release of Louis Dabney Smith, Jr. from

the military stockade at Fort Jackson, South Carolina; be and the same is hereby granted upon the ground that he is not now subject to military law, and the said court martial proceedings against him are therefore null and void for lack of jurisdiction.

2. That the imprisonment and detention of the said Louis Dabney Smith, Jr. by the respondent herein is illegal and without authority of law, and he is hereby ordered to be released and discharged therefrom.

(Signed) C. C. WICHE,
United States District Judge.

Dated: Spartanburg, S. C., April 29, 1944.